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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 452

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHARLES T. FISHER, EDWARD F. FISHER, AND LEO M. BUTZEL, EXECUTORS OF THE ESTATE OF FRED J. FISHER, AND BERTHA M. FISHER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1945
CERTIORARI GRANTED NOVEMBER 5, 1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 452

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHARLES T. FISHER, EDWARD F. FISHER, AND LEO M. BUTZEL, EXECUTORS OF THE ESTATE OF FRED J. FISHER, AND BURTHA M. FISHER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

1 In the Tax Court of the United States

Docket No. 104601

FRED J. FISHER AND BURTHA M. FISHER, HUSBAND AND WIFE. AMENDED TITLE—ESTATE OF FRED J. FISHER, DECEASED, CHARLES T. FISHER, EDWARD F. FISHER AND LEO M. BUTZEL, EXECUTORS AND BURTHA M. FISHER (See Order of 10-19-42) PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances

For Taxpayer: Benjamin E. Jaffe, Esq., R. M. O'Hara, Esq.
For Commissioner: Philip M. Clark, Esq.

Docket Entries

1940

Sept. 6—Petition received and filed. Taxpayer notified. Fee paid.
Sept. 6—Copy of petition served on General Counsel.
Nov. 4—Answer filed by General Counsel.
Nov. 4—Request for hearing in Detroit, Michigan, filed by General Counsel.
Nov. 8—Notice issued placing proceeding on Detroit, Michigan calendar. Service of answer and request made.

2 1941

July 18—Hearing set September 15, 1941, in Detroit, Michigan.
Aug. 25—Motion for a continuance to the next calendar to be heard in Detroit, Michigan, filed by taxpayer. 8-26-41 granted.

1942

Sept. 25—Hearing set November 2, 1942, in Detroit, Michigan.
Oct. 19—Notice of appearance of R. M. O'Hara as counsel filed.
Oct. 19—Motion for substitution of parties filed by taxpayer.
Oct. 19—Order that henceforth the caption of this proceeding shall be Estate of Fred J. Fisher, deceased, Charles T. Fisher, Edward F. Fisher and Leo M. Butzel, Executors and Burtha M. Fisher, entered.
Oct. 27—Application for subpoena to R. L. Dando filed by General Counsel, 10-27-42 Subpoena issued.
Oct. 27—Application for subpoena to Robert C. Haydock filed by General Counsel. 10-27-42 Subpoena issued.

Oct. 28—Motion for continuance to the next Detroit Circuit Calendar after January 1, 1943, filed by taxpayer. 10-28-42 Granted.

1943

Aug. 17—Hearing set September 27, 1943; in Detroit, Michigan.

Aug. 27—Application for subpoena duces tecum to Robert C. Haydock filed by General Counsel. 8-27-43 Subpoena issued.

Aug. 27—Application for subpoena to R. L. Dando filed by General Counsel. 8-27-43 Subpoena issued.

Sept. 29—Hearing had before Judge Sternhagen, on the merits. Submitted. Stipulation of facts filed. Briefs due as per rules.

Oct. 11—Transcript of hearing 9-29-43 filed.

Nov. 11—Motion for extension to Dec. 10, 1943, to file brief, filed by taxpayer. 11-11-43 granted.

3 Nov. 13—Memorandum brief filed by General Counsel. Served 12-20-43.

Dec. 20—Brief filed by taxpayer. 12-20-43 Copy served.

1944

Jan. 10—Stipulation correcting transcript of testimony filed.

Feb. 9—Memorandum opinion rendered, Judge Sternhagen, Div. 10. Decision will be entered under Rule 50. 2-10-44 Copy served.

Mar. 22—Computation of deficiency filed by General Counsel. Agreed to.

Mar. 23—Decision entered. Judge Sternhagen, Div. 10.

June 22—Petition for review by U. S. Circuit Court of Appeals, 6th Circuit, filed by General Counsel.

June 22—Notice of filing petition for review sent to Benjamin E. Jaffe filed.

July 17—Motion for extension to 9-20-44 to transmit, prepare, and deliver record filed by General Counsel.

July 17—Order enlarging time to 9-20-44 to transmit and deliver record entered.

July 24—Proof of service filed by General Counsel.

Aug. 29—Statement of points with statement of service by mail thereon, filed by General Counsel.

Aug. 29—Designation of record filed by General Counsel. Statement of service by mail thereon.

In the Tax Court of the United States

Petition

Filed September 6, 1490

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IT:Conf.) dated June 14, 1940, and as a basis of this proceeding allege as follows:

1. Petitioners are individuals, husband and wife, with residence at 54 Arden Park, Detroit, Michigan. Petitioners
4 filed a joint income tax return for the year here involved with the Collector of Internal Revenue at Detroit, Michigan.

2. The notice of deficiency (a copy of which is hereto attached and marked Exhibit A) appears to have been mailed to the petitioners on June 14, 1940.

3. The taxes in controversy are income taxes in the sum of $1,231,636.92 claimed in the notice of deficiency for the calendar year 1934, and $36,290.33 income taxes which these petitioners claim they have overpaid for the said year.

4. The determination of tax set forth in the said notice of deficiency and the claim for the refund of said overpayment are based upon the following errors:

* * * * *

(c) The respondent erred in holding that the distribution by Senior Investment Corporation of 43,300 shares of General Motors Corporation common stock to petitioner Fred J. Fisher on January 31, 1934, constituted a taxable dividend, and respondent erred in adding $1,723,881.25 to the taxable income of the petitioners.

(d) The respondent erred in failing to find that the petitioners had overpaid income taxes for the year 1934 in the sum of $36,290.33.

5. The facts upon which the petitioners rely as a basis of this proceeding are as follows:

* * * * *

(c) Senior Investment Corporation was organized on July 29, 1929, under the laws of the State of Michigan. The authorized capital stock consisted of 300,000 shares without nominal or par value, being 100,000 shares of Class A, 100,000 shares Class B, and 100,000 shares of Class C stock. The corporation issued 80,716 shares of its Class A stock and 100,000 shares of its Class C stock for property having a total value of $56,718,058.92, subject

to liabilities assumed by the corporation amounting to $8,288,381.16, giving a net value of $48,429,677.76. The corporation issued its 100,000 shares of Class B stock for property having a value of $40,000,000.00.

On August 29, 1933, Senior Investment Corporation was reorganized pursuant to a Plan of Reorganization, dated August 23, 1933. Immediately prior to said reorganization, Senior Investment Corporation had an operating deficit of $21,041,234.22. Pursuant to said Plan of Reorganization, a Delaware corporation was organized by name of Senior Corporation, with an authorized capital stock of 300,000 shares, consisting of 100,000 shares of Class A stock of the par value of $10 per share, 100,000 shares of Class B stock of the par value of $10 per share and 100,000 shares of Class C stock without par value. Senior Investment Corporation transferred to the said Delaware corporation assets of a value of $20,838,325.63, in exchange for 71,753 shares of its Class A stock, 100,000 shares of its Class B stock and 100,000 shares of its Class C stock, which shares of stock were issued to the stockholders of Senior Investment Corporation in the proportions they were entitled to. Senior Investment Corporation retained assets of a net value of $5,677,827.19 and reduced its authorized capital stock to 200,000 shares, consisting of 100,000 shares of Class A stock with a par value of $5 per share and 100,000 shares of Class C stock with a par value of $1 per share. The holders of Class B stock surrendered same for cancellation and pursuant to corporate action, the outstanding Class A and Class C certificates were stamped with the following legend:

"Class A stock became stock of the par value of $5.00 per share and Class C stock became stock of the par value of $1.00 per share, and Class B stock was eliminated and the powers, preferences and rights and the qualifications, limitations or restrictions with respect to the Class A stock and Class C stock were amended by

6 amendment to the Articles of Incorporation effective August 29, 1933, pursuant to Plan of Reorganization and Recapitalization dated August 23, 1933."

In the Articles of Incorporation of the Delaware corporation and in the amended Articles of Senior Investment Corporation, the various classes of stock provided for, and the powers, preferences and rights thereof as to dividends, redemption and liquidation, were worked out in such manner that upon the consummation of the said Plan of Reorganization the powers, preferences and rights, and the qualifications, limitations or restrictions of the respective classes of stock of the two corporations were in sum total equivalent to the powers, preferences and rights, and the qualifications, limitations or restrictions of the respective classes of stock of Senior Investment Corporation, thus preserving the

status of all of the stockholders of Senior Investment Corporation as it existed just prior to the said reorganization.

(c) On January 31, 1934, the Board of Directors of Senior Investment Corporation adopted a resolution providing for a capital distribution of a total of 43,300 shares of common stock of General Motors Corporation to the holders of 71,753 shares of the Class A stock of said corporation outstanding and said resolution provided that such capital distribution was to be made on the following basis:

1. With respect to 71,750 shares of the Class A stock of said Senior Investment Corporation there shall be distributed .605 share of common stock of General Motors Corporation upon each share of such 71,750 Class A shares held, and

2. With respect to 3 shares of the Class A stock of said Senior Investment Corporation there shall be distributed .05 share of common stock of General Motors Corporation upon each share of such 3 Class A shares held.

Thereafter the capital distribution as provided for by
7 said resolution was made by said corporation. The 43,300 shares of General Motors Corporation common stock were distributed to petitioner Fred J. Fisher by virtue of his ownership of the said 71,753 shares of the Class A stock of Senior Investment Corporation. The said 43,300 shares of General Motors Corporation common stock were the same shares that petitioner Fred J. Fisher transferred to Senior Investment Corporation upon its organization, in payment of the capital stock of said corporation issued to him.

At the time of said distribution, Senior Investment Corporation did not have any earnings or profits available for distribution but on the contrary had an operating deficit in excess of $6,000,000.00.

* * * * *

Wherefore, the petitioners pray that this Board may hear the proceedings and find—

* * * * *

3. That the distribution by Senior Investment Corporation of 43,300 shares of General Motors Corporation common stock to the petitioner Fred J. Fisher did not constitute a taxable dividend to him but represented a capital distribution which reduced the cost basis of his stock in said corporation;

4. That there is no deficiency of income tax due from the petitioners, or either of them, for the year 1934;

5. That the petitioners have within three years before the filing of the claim for refund, as aforesaid, overpaid income taxes for the year 1934 in the sum of $36,290.33 and are entitled to a refund thereof, together with interest as allowed by law;

6. Petitioners further pray that the Board may grant the petitioners such other and further relief as the Board may think just, equitable and proper.

BENJAMIN E. JAFFE,
Attorney for Petitioners,
2406 Fisher Building, Detroit, Michigan.

8 [*Duly sworn to by Fred J. Fisher and Burtha M. Fisher; jurat omitted in printing.*]

Exhibit A to petition

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Office of Internal Revenue Agent in Charge, Detroit Division
555 Federal Building, Detroit, Michigan

JUNE 14, 1940.

IT: Conf.

Mr. FRED J. FISHER and Mrs. BURTHA M. FISHER, Husband and Wife,
2600 Fisher Building, Detroit, Michigan.

SIR AND MADAM: You are advised that the determination of your income tax liability for the taxable year 1934 discloses a deficiency of $1,231,636.92 as shown in the statement attached.

9 In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Detroit, Michigan for the attention of IT: Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING, *Commissioner,*
By GEO. E. NEAL (signed),
Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver.

10 IT: Conf. STATEMENT

Mr. Fred J. Fisher, and Mrs. Bertha M. Fisher, Husband and Wife

2600 Fisher Building, Detroit, Michigan

TAX LIABILITY FOR TAXABLE YEAR ENDED DECEMBER 31, 1934

	Liability	Assessed	Deficiency
Income Tax	$1,280,357.28	$48,720.36	$1,231,636.92

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated August 17, 1936; to your protest dated October 28, 1936; to the statements made at conferences held on December 1, 1936 and May 23 and 24, 1940: and to your claim for refund filed December 3, 1937.

If a petition to the United States Board of Tax Appeals is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Board in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with Section 1103 (a) of the Revenue Act of 1932.

In the return as filed, an amount of $75,000.00 was reported as taxable income representing 3% of the consideration paid for the purchase of annuity contracts.

The contention in your claim for refund that this sum of $75,000.00 was erroneously reported is denied.

The interest received on the annuity contracts with the several insurance companies is held to be taxable income in the year received.

A copy of this letter has been mailed to your representatives, Messrs. John M. Dooley and Benjamin E. Jaffe, Fisher Building, Detroit, Michigan, in accordance with authority contained in a power of attorney executed by you and on file in the Bureau.

11 ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		$142,168.03
Unallowable Deductions and Additional Income:		
(a) Salary	$7,500.00	
(b) Loss on sale of Electric Bond and Share Co. limited by Section 117	6,161.44	
(c) Loss on sales of stock Fred J. Fisher, Limited by Section 117	14,892.24	
(d) Gain on sale General Motors (Burtha M. Fisher)	404,945.32	
(e) Dividends on Senior Investment Company (Fred J. Fisher)	1,723,881.25	
(f) Contributions decreased	1,000.00	2,158,389.25
Total		2,300,548.28
Nontaxable Income and Additional Deductions:		
(g) Dividends decreased (Burtha M. Fisher)		60,995.00
Net Income as adjusted		2,239,553.28

EXPLANATION OF ADJUSTMENTS

* * * * *

(e) The distribution of 43,000 shares of common stock of General Motors Corporation by Senior Investment Corporation in 1934 is treated as a taxable dividend inasmuch as Senior Investment Corporation had ample surplus based on transferor's costs of securities acquired from the incorporators.

Section 111 (c) of the Revenue Act of 1934 provides as follows:

"*Recognition of gain or loss.*—In the case of a sale or
12 exchange, the extent to which the gain or loss determined under this section shall be recognized *for the purpose of this title, shall* be determined under the provisions of Section 112."

Section 112 (b) (5) provides as follows:

"Transfer to Corporation Controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange."

Since the gain, i. e., the difference between the transferors' cost and the fair market value of stock issued therefor was not recognized for the purposes of title one of the act when Senior Investment Corporation was formed, it is recognized when realized by actual sales of the securities. It is therefore held that the dis-

tribution received from Senior Investment Corporation is taxable as an ordinary dividend.

The dividends have, therefore been increased by the market value of the stock when acquired, or $1,723,881.25, since you reported no income from this distribution.

* * * * *

COMPUTATION OF TAX

Net income adjusted		$2,239,553.28
Less:		
Personal exemption		2,500.00
Balance (Surtax net income)		2,237,053.28
Less:		
Dividends	$1,799,357.17	
Earned income credit (10% of $3,000.00)	300.00	1,799,657.17
Net income subject to normal tax		437,396.11
13 Normal tax at 4% on $437,396.11		17,495.84
Surtax on $2,233,053.28 (Amount in excess of $4,000.00)		1,262,861.44
Corrected income tax liability		1,280,357.28
Income tax assessed:		
Original, Account No. 200508		48,720.36
Deficiency of income tax		1,231,636.92

In the Tax Court of the United States

Answer

Filed November 4, 1940

Comes now the Commissioner of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein admits, and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are incomes taxes in the sum of $1,231,636.92 claimed in the notice of deficiency for the calendar year 1934, but denies the remaining allegations contained in paragraph 3 of the petition.

4. (a), (b), (c) and (d). Denies the allegations contained in subparagraphs (a) to (d), inclusive, of paragraph 4 of the petition.

5. (a). Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

5. (b), second (c) and (d). Denies the allegations contained in subparagraphs (b), second (c) and (d) of paragraph 5 of the petition.

5, first (c). Admits that Senior Investment Corporation was organized on July 29, 1929, under the laws of the State of
14 Michigan, but denies the remaining allegations contained in the first subparagraph (c) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) J. P. WENCHEL,
PAS
Chief Counsel,
Bureau of Internal Revenue

Of Counsel:
DEWITT M. EVANS,
Division Counsel,
HOMER J. FISHER,
Special Attorney,
Bureau of Internal Revenue.

In the Tax Court of the United States

Order for substitution of parties

On suggestion of death of Fred J. Fisher and notice of the appointment of Executors filed in the above-entitled proceeding, it is

Ordered, that Charles T. Fisher, Edward F. Fisher and Leo M. Butzel, Executors of the Estate of Fred J. Fisher, deceased, are substituted in the place and stead of Fred J. Fisher, deceased, and that henceforth the caption of this proceeding shall be Estate of Fred J. Fisher, deceased, Charles T. Fisher, Edward F. Fisher and Leo M. Butzel, Executors and Bertha M. Fisher, Petitioners, v. Commissioner of Internal Revenue, Respondent.

(Signed) J. E. MURDOCK, *Member.*

Dated: Washington, D. C., October 19, 1942.

15 In the Tax Court of the United States

Stipulation of facts

Filed at hearing September 29, 1943

It is hereby stipulated and agreed by and between the respective parties hereto, by their attorneys, that the following facts are true and may be considered as evidence in the above entitled cause; provided, however, that either party hereto may introduce further

evidence not inconsistent with the facts herein stipulated as true:

1. This proceeding arises from the determination of a deficiency by the Commissioner of Internal Revenue on a joint return for the calendar year 1934 of Fred J. Fisher and his wife, Burtha M. Fisher, residents of Detroit, Michigan, filed with the Collector of Internal Revenue at Detroit, Michigan. Fred J. Fisher died on July 14, 1941, and his estate has been substituted as petitioner in his stead. The petition appealing from said proposed deficiency was filed herein on September 6, 1940, and has been pending ever since said date.

2. Respondent confesses error in respect to assignment of error 4 (a) appearing on page 2 of the petition herein, and it is agreed that net income as shown in the deficiency notice may be reduced by the sum of $14,892.24, said amount being a loss sustained by Fred J. Fisher on the sale of securities which is deductible from gross income shown on the joint return, on the authority of Helvering v. Janney, 311 U. S. 189.

3. On January 31, 1934 Fred J. Fisher owned 71,573 shares of the Class A stock of Senior Investment Corporation, a Michigan corporation. On that date he received a distribution on said Class A shares of 43,300 shares of the common stock of General Motors Corporation, without the surrender by him of any of the said Class A shares. Said distribution was made pursuant to the authority contained in a resolution of the Board of Directors of Senior Investment Corporation adopted at a duly called special meeting of the directors, held on January 31, 1934. The action of the directors taken at said meeting of January 31, 1934 was approved, ratified and confirmed by the stockholders at the annual meeting held on May 8, 1934. True copies of the minutes
16 of said meetings are filed herewith, marked "Joint Exhibit A-1." The said distribution was the only distribution made by Senior Investment Corporation during the period from the date of incorporation to July 14, 1941, the date of the death of Fred J. Fisher.

4. The value of said 43,300 shares of General Motors stock at January 31, 1934 was $1,723,881.25. Respondent in his determination of a deficiency has considered the aforesaid distribution as an ordinary dividend and has included the value of said General Motors shares in the gross income of Fred J. Fisher. In the joint income tax return filed by Fred J. Fisher and Burtha M. Fisher for the year 1934 no taxable income was reported by virtue of the said distribution on the ground that said distribution was a capital distribution to be applied against the cost or basis in the hands of Fred J. Fisher of the aforesaid 71,573 shares of Class A stock of Senior Investment Corporation. The cost or basis to Fred J. Fisher of the aforesaid 71,573 shares of the Class A stock

of Senior Investment Corporation on which said distribution was made was in excess of $1,723,881.25.

5. Senior Investment Corporation was incorporated on July 29, 1929 under the laws of the State of Michigan, with an authorized capital of 300,000 shares of no par value stock consisting of the following:

100,000 shares Class A stock.
100,000 shares Class B stock.
100,000 shares Class C stock.

The incorporators were Fred J. Fisher, his wife, Burtha M. Fisher, Andrew E. Baldwin and Leo M. Butzel. True copies of the Articles of Association of said corporation and of an amendment thereto filed in December, 1931, are filed herewith, marked "Joint Exhibit A-2." Said amendment filed in December, 1931, is the only amendment made to the original Articles of Association until the amendment of August 29, 1933, hereinafter mentioned. During 1934 Senior Investment Corporation was a
17 personal holding company within the meaning of the pertinent provision of the Revenue Act of 1934.

6. On July 29, 1929, immediately following incorporation, Fred J. Fisher paid in, in exchange for the issuance to him of 71,573 shares of Class A and 79,805 shares of Class C stock of Senior Investment Corporation, assets consisting principally of securities with a market value of $51,081,808.92, against which there were liabilities of $8,138,381.16 which were assumed by Senior Investment Corporation. Of the amount so paid in $372.24 was assigned to and in exchange for the Class C stock, and the balance was assigned to and in exchange for the Class A stock. On the same date Burtha M. Fisher paid in, in exchange for the issuance to her of 9,143 shares of Class A and 10,195 shares of Class C stock of Senior Investment Corporation, assets consisting entirely of securities with a market value of $5,636,250.00, against which there was a liability of $150,000.00 which was assumed by Senior Investment Corporation. Of the amount so paid in $450.00 was assigned to and in exchange for the Class C stock, and the balance was assigned to and in exchange for the Class A stock. The cost to Fred J. Fisher of the assets paid in for the Class A and the Class C stock was $12,957,242.88, and the cost to Burtha M. Fisher of the assets paid in for the Class A and the Class C stock was $699,350.00. The cost to Fred J. Fisher and the cost to Burtha M. Fisher, respectively, of the assets paid in for the Class C stock was less than $500.00. The remaining 10,000 shares of Class C stock were issued to Andrew E. Baldwin on July 29, 1929, without the payment by him of any consideration therefor and as one of the conditions of an employment contract with Senior Investment Corporation.

7. At the same time that the Class A and Class C stock was issued, as aforesaid, Fred J. Fisher paid in, in exchange for the 100,000 shares of Class B stock of Senior Investment Corporation, all of his holdings of stock in Fisher & Company, a Michigan corporation. Said Fisher & Company stock on July 29,
18 1929, had a fair market value of $40,000,000.00. The cost to Fred J. Fisher of the Fisher & Company stock was $894,060.02. The stock of Fisher & Company paid in by Fred J. Fisher in exchange for Class B Stock of Senior Investment Corporation represented approximately one-fifth of the total outstanding stock of Fisher & Company.

8. Amon gthe rights, powers, and privileges of the said Class A stock, Class B stock, and Class C stock were the following:

The C stock alone had voting power. The A stock was entitled to cumulative dividends of $24.00 per share per annum and no more from the net profits other than the net income from the Fisher & Company stock. The B stock was entitled to receive in each year in dividends the total net income received by Senior Investment Corporation from the Fisher & Company stock up to $24.00 per share per annum, and, if such net income exceeded the amount of $24.00 per share, the C stock was entitled to receive, from the excess, dividends of $1.00 per share, and any amount remaining was to be distributed equally, share for share, between the B and the C stock. Increases in the book value of the Fisher & Company stock were to accrue annually to the B and the C stock in prescribed proportions and the amount accrued to each such class of stock and each share of each class was to be credited in an account on the books of Senior Investment Corporation, subject to distribution only upon the liquidation of the said corporation. In addition to dividends payable out of net income received from the Fisher & Company stock, the C stock was entitled to such dividends as might be declared out of the net profits (except those arising from income from the Fisher & Company stock) remaining after payment of the cumulative dividends on the A stock for all previous dividend periods and the setting aside of dividends thereon for the current dividend period. Upon the liquidation of Senior Investment Corporation the A stock was entitled to receive out of the assets other than the Fisher & Company stock
$600.00 per share plus accrued dividends, and at any
19 time prior to liquidation it was subject to redemption at such price not in excess of $600.00 as might be agreed upon by the shareholder and the said corporation. Upon liquidation the B stock was entitled to receive out of the Fisher & Company stock then owned by Senior Investment Corporation $400.00 in cash per share plus the distributable net income therefrom, and the remaining value of the Fisher & Company stock was to be

distributed to the holders of the B and C stock in
and up to the amounts which the net increase in va
to the B and C stock, and any balance over the amo
was to be distributed as assets other than Fisher &
The B stock was subject to redemption at any time
terms as in the case of liquidation. Upon liquidat
was entitled to share ratably in all remaining asset
in full of the amounts due the holders of the A and

The dividend rate of $24.00 per share per annum
stock and the redemption values of $600.00 for t
$400.00 for the B stock were fixed by the incorp
basis of the anticipated earnings and the marke
securities which were paid in, respectively, for t
the B stock.

9. On December 9, 1931 Senior Investment Corp
the 9,143 shares of Class A stock which had been i
M. Fisher on organization, and thereafter and at al
to this proceeding the outstanding stock of Sen
Corporation was owned by the following persons, i
shares set opposite their names:

	Class A stock
Fred J. Fisher	71,573
Bertha M. Fisher	None
Andrew E. Baldwin	None

20 The 100,000 shares of Class B stock standi
of Fred J. Fisher were cancelled as of Jun
part of the reorganization, as more fully set out he

10. On June 30, 1933 Senior Investment Corp
operating deficit as shown on its books of $21,041
riving at said operating deficit, gain or loss from t
disposition of assets paid in for stock on incorpor
puted by use of corporate cost or the market valu
when so paid in.

11. By reason of certain transactions and acc
which had taken place prior to June 30, 1933, bu
recorded on the books until thereafter, the afor
$21,041,234.12 was overstated to the extent of $5
adjusted deficit at June 30, 1933 was $20,530,234.13.

12. If during the period of corporate existence
30, 1933 gain or loss from the sale or other dispo
paid in for stock on incorporation were compute
transferor's cost, Senior Investment Corporatio
would have had an adjusted surplus of approxi
000.00.

13. In August, 1933, Senior Investment Corporation consummated a nontaxable reorganization and recapitalization as of June 30, 1933 under the Revenue Act of 1932, and pursuant to the terms of a written Agreement and Plan of Reorganization and Recapitalization. Pursuant to the Agreement and Plan, a new corporation known as Senior Corporation was organized under the laws of the State of Delaware, with an authorized capital stock of 300,000 shares consisting of 100,000 shares of Class A stock, 100,000 shares of Class B stock and 100,000 shares of Class C stock. The written Agreement and Plan was executed by the stockholders of Senior Investment Corporation, by Senior Investment Corporation and by Senior Corporation, the new company, and was approved, ratified and adopted by the directors and stockholders of said corporations at duly convened meetings of such directors and stockholders. A true copy of said Agreement and Plan of Reorganization and Recapitalization is filed herewith, marked "Joint Exhibit A–3."

14. In executing and carrying out the Agreement and Plan the parties relied upon and gave effect to a balance sheet of Senior Investment Corporation taken from its books as of June 30, 1933, which showed an operating deficit of $21,011,234.12, and a worksheet showing assets and liabilities of Senior Investment Corporation at June 30, 1933, both at book value and market value, and showing also at market value those assets to be transferred to the new company and the assets and liabilities to be retained by Senior Investment Corporation. The parties also were guided by and gave effect to the instructions set out in a memorandum prepared by Counsel for Senior Investment Corporation, advising of the steps to be taken in the consummation of the Agreement and Plan and the reasons therefor. There are being filed herewith a true copy of the said balance sheet at June 30, 1933, taken from the books of Senior Investment Corporation, to which are attached balance sheets of said corporation and of Senior Corporation, immediately after the reorganization, the worksheet showing assets and liabilities of Senior Investment Corporation at June 30, 1933, as aforesaid, and the aforesaid memorandum of Counsel, marked "Joint Exhibit A–4," "Joint Exhibit A–5," and "Joint Exhibit A–6," respectively.

15. In the reorganization, Senior Investment Corporation assigned, transferred, and delivered to Senior Corporation by proper instruments of assignment and transfer, the Fisher & Company stock then held by it, together with cash of $1,675,000.00 theretofore received by Senior Investment Corporation in redemption of a part of said Fisher & Company stock, and canceled all of the Class B stock outstanding. Senior Corporation, in exchange,

issued to Fred J. Fisher the 100,000 shares of its Class B stock, having the same rights, powers, and privileges as the shares of Class B stock of Senior Investment Corporation before the
22 reorganization, as stated in its Certificate of Incorporation. With respect to assets other than stock of Fisher & Company, and other than the $1,675,000.00 hereinbefore mentioned, Senior Investment Corporation assigned, transferred, and delivered to Senior Corporation, by proper instruments of assignment and transfer, cash of $325,000.00, and certain notes and accounts receivable with a face value of $10,838,325.63, or a total of $11,163,325.63. In exchange therefor Senior Corporation issued 71,573 shares of its Class A stock and the 100,000 shares of its Class C stock direct to the holders of the Class A and Class C stock of Senior Investment Corporation, as shown in paragraph 9 hereof, being on the basis of one share of Class A stock and one share of Class C stock, respectively, of Senior Corporation for each share of Class A stock and Class C stock of Senior Investment Corporation. All remaining assets were retained by Senior Investment Corporation. Such remaining assets had a market value of $6,988,122.92, and the liabilities, none of which were assumed by Senior Corporation, amounted to $1,320,295.33.

16. Pursuant to the Plan of Reorganization and Recapitalization the deficit of $21,041,234.12 was allocated between the two corporations on the basis of the ratios existing between the market value of the assets retained by Senior Investment Corporation, less the liabilities, and the market value of assets transferred to Senior Corporation other than Fisher & Company stock. For this purpose the $1,675,000.00 referred to in paragraph 15 hereof was included in assets other than Fisher & Company stock transferred to Senior Corporation. On that formula 30.62672% of the total deficit, or $6,444,239.86, was retained by Senior Investment Corporation, and 69.37328% thereof, or $14,596,994.26, was assumed by Senior Corporation.

17. The dividend rights and the rights on liquidation, dissolution or redemption of the Class A and Class C stock as set out in the Articles of Association of Senior Investment Corporation were likewise allocated between the Class A and Class C
23 stock of Senior Investment Corporation and of Senior Corporation on the basis of the same ratios. The rights of the Class A and Class C stock of Senior Investment Corporation after the reorganization were set out in an amendment to the Articles of Association of Senior Investment Corporation filed August 29, 1933, and the rights of the Class A, Class B, and Class C stock of Senior Corporation were set out in the Certificate of Incorporation

of Senior Corporation filed with the Secretary of the State of Delaware on August 26, 1933.

18. The aforesaid amendment to the Articles of Association of Senior Investment Corporation contained a provision reading as follows:

"(3) *Transfers to capital.*—The earnings and profts of the corporation to the extent of $6,444,239.96 shall from time to time be transferred to capital or capital surplus or surplus, and anything herein contained or otherwise to the contrary notwithstanding, no dividends, whether cumulated or current, shall be paid or set aside on any shares of stock of the corporation until earnings and profits of the corporation in the sum of $6,444,239.96 have been so transferred to capital or capital surplus or surplus."

The Certificate of Incorporation of Senior Corporation contained a similar provision prohibiting the payment of dividends on any shares of its stock until earnings and profits to the extent of $14,596 994.26 had been transferred to capital or capital surplus or surplus.

19. In carrying out the reorganization and recapitalization pursuant to the Plan, the amendment to the Articles of Association of Senior Investment Corporation, filed as aforesaid, reduced the capital stock of the corporation from 300,000 shares without par value to 100,000 shares of Class A stock with a par value of $5.00 per share and 100,000 shares of Class C stock with a par value of $1.00 per share. The outstanding certificate of Class A and
24 Class C stock of Senior Investment Corporation were not cancelled but were stamped with a legend reading as follows:

"Class A stock became stock of the par value of $5.00 per share and Class C stock became stock of the par value of $1.00 per share, and Class B stock was eliminated and the powers, preferences and rights, and the qualifications, limitations or restrictions with respect to the Class A stock and Class C stock were amended by amendment to the Articles of Incorporation effective August 29, 1933, pursuant to the Plan of Reorganization and Recapitalization dated August 23, 1933."

True copies of the Certificate of Incorporation of Senior Corporation and of the Amendment to the Articles of Association of Senior Investment Corporation filed August 29, 1933, are filed herewith, marked "Joint Exhibits A–7 and A–8," respectively.

20. True copies of minutes of meetings of the directors and stockholders of Senior Investment Corporation, and of the first meeting of the directors of Senior Corporation, at which action

was taken as set out in said minutes, are filed herewith, marked "Joint Exhibits A-9 to A-13, inclusive," and are as follows:

JOINT EXHIBIT

A-9—Minutes of Special Meeting of Directors of Senior Investment Corporation, August 24, 1933;

A-10—Minutes of Special Meeting of Stockholders of Senior Investment Corporation, August 24, 1933;

A-11—Minutes of Special Meeting of Stockholders of Senior Investment Corporation, August 28, 1933;

A-12—Minutes of Special Meeting of Directors of Senior Investment Corporation, August 28, 1933;

A-13—Minutes of First Meeting of Directors of Senior Corporation, August 28, 1933.

21. The books and records of Senior Investment Corporation for the period subsequent to June 30, 1933, permit a determination of earnings and profits and losses computed on three bases, which are as follows:

Basis (a): The use of transferor's cost as to assets acquired on organization in July, 1929, and of corporate cost of assets thereafter acquired.

Basis (b): The use of corporate cost, or value at July 29, 1929, for assets acquired on organization, and of corporate cost for assets thereafter acquired.

Basis (c) The use of market value as of July 30, 1933 for assets acquired prior thereto and retained in the reorganization, and of corporate cost for assets thereafter acquired.

The earnings and profits and losses of Senior Investment Corporation for the last six months of 1933 and for the month of January, 1934, on the above three bases, and after giving effect to adjustments resulting from audits of its returns by the Treasury Department, and accepted by Senior Corporation, were as follows:

Year	Basis (a)	Basis (b)	Basis (c)
July 1, 1933 to Dec. 31, 1933	($615,762.65)	($615,762.65)	($229,679.68)
Month of January 1934	21,407.88	21,407.88	23,720.38
Total for above 7-months period	(594,354.77)	(594,354.77)	(205,959.30)

(Figures in parentheses denote net loss.)

22. Senior Investment Corporation, both before and after the reorganization and recapitalization, in determining its Federal tax liabilities on its tax returns, computed its taxable income by the use of transferor's cost as to assets acquired by it on organization on July 20, 1929, and of corporate cost for assets thereafter acquired. Senior Corporation, in determining its Federal tax liabilities on its tax returns, treated the reorganization of

26 June 30, 1933 as a nontaxable reorganization, and computed its taxable income on the basis prescribed in such instances by the applicable Revenue Acts.

BENJAMIN E. JAFFE,
R. M. O'HARA,
Counsel for Petitioners.
J. P. WENCHEL, JR.,
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

Joint Exhibit A-1

SPECIAL MEETING OF BOARD OF DIRECTORS OF SENIOR INVESTMENT CORPORATION

Minutes of Special Meeting of the Board of Directors of the Senior Investment Corporation at 2400 Fisher Building, City of Detroit, Michigan, on the 31st day of January 1934.

A quorum was present. Mr. Fisher, president of the corporation, presided and Mr. Maynard, secretary, recorded the minutes. Upon motion duly made and seconded, the following resolutions were unanimously adopted.

"Resolved, that this corporation make a capital distribution of a total of 43,300 shares of the common stock of General Motors Corporation owned by this corporation to the holders of the 71,573 shares of the Class A stock of this corporation outstanding, said capital distribution to be made on the following basis:

"(a) With respect to 71,570 shares of the Class A stock of this corporation there shall be distributed .605 share of common
27 stock of General Motors Corporation upon each share of such 71,570 Class A shares held; and

"(b) With respect to 3 shares of the Class A stock of this corporation, there shall be distributed .05 share of common stock of General Motors Corporation upon each share of such 3 Class A shares held.

"Further Resolved, That the proper officers of this corporation be and they are hereby authorized and directed to cause said capital distribution to be fully consummated as provided in the foregoing resolution, to cause said 43,300 shares of the common stock of General Motors Corporation to be transferred and delivered to the holders of the Class A stock of this corporation as they may be entitled thereto pursuant to the foregoing resolution and to do any and all such things and to execute all such instruments and documents as may be necessary to carry out the foregoing resolution."

There being no further business to come before the meeting, on motion the same adjourned.

HORACE S. MAYNARD,
Secretary.

SENIOR INVESTMENT CORPORATION WAIVER OF NOTICE OF SPECIAL MEETING OF BOARD OF DIRECTORS

We, the undersigned, being all of the directors of the Senior Investment Corporation, do hereby waive notice of the time, place and purpose of the meeting of the Board of Directors of said corporation and do fix the 31st day January, 1934, at 10 o'clock in the morning as the time, and Room 2400 Fisher Building, in the City of Detroit, Michigan as the place of said meeting.

28 And we do hereby consent to the transaction of any kind all business that may come before said meeting.

Dated: January 31st, 1934

F. J. FISHER,
LEO BUTZEL,
ANDREW E. BALDWIN,
JOHN C. MOONS,
HORACE S. MAYNARD.

HORACE S. MAYNARD,
Secretary.

MINUTES OF ANNUAL MEETING OF STOCKHOLDERS SENIOR INVESTMENT CORPORATION

May 8th, 1934

The annual meeting of stockholders of Senior Investment Corporation was held on the twenty-fourth floor of the Fisher Building at 2 o'clock in the afternoon of Tuesday, May 8th, 1934, in accordance with due notice as provided in the by-laws.

Mr. Fisher, president of the corporation, presided as Chairman and Mr. Maynard, secretary of the corporation, acted as Secretary of the meeting.

Mr. Fisher submitted proxies which together with his own holdings represented 100% of the outstanding capital stock.

The minutes of the last annual meeting of the stockholders and of the special meetings subsequent thereto were read and approved.

The minutes of all meetings of the Board of Directors held since the last annual stockholders meeting were presented to the meeting.

On motion duly made and seconded, the following resolution was unanimously adopted:

29 "Resolved, that all the acts of the directors and officers of this corporation as shown by the minutes of the directors meetings since the last annual meeting of the stockholders be and they hereby are in all respects approved, ratified and confirmed."

The meeting then proceeded to the election of a board of directors to hold office until the next annual meeting of the stockholders and until their successors are elected and qualify.

The following were thereupon duly and unanimously elected directors of the corporation:

Fred J. Fisher.
Andrew E. Baldwin.
Leo M. Butzel.
John C. Moons.
Horace S. Maynard.

There being no further business, the meeting adjourned.

HORACE S. MAYNARD.
Secretary.

Joint Exhibit A-2

(Corporation for pecuniary profit)

ARTICLES OF INCORPORATION OF SENIOR INVESTMENT CORPORATION

We, the undersigned, desiring to become incorporated under the provisions of Act No. 84 of the Public Acts of 1921 (as amended), entitled "An act to provide for the organization, regulation and classification of domestic corporations; to prescribe their rights, powers, privileges and immunities; to prescribe the conditions upon which corporations may exercise their franchises," etc., do hereby make, execute and adopt the following Articles of Association, to wit:

30 ARTILE I

The name assumed by this corporation and by which it shall be known in law is:

SENIOR INVESTMENT CORPORATION

ARTICLE II

This corporation intends to proceed under Section 1 of Chapter 1, Part 1, of the above act.

ARTICLE III

The purposes of this corporation are as follows:

(1) To purchase, exchange or otherwise acquire, underwrite, hold sell and/or sell short, exchange, pledge, hypothecate, or

otherwise dispose of or deal in, the stocks, bonds, notes, debentures or other evidences of indebtedness, obligations of and/or interests in any private, public, quasi-public, or municipal corporation, domestic or foreign, or of any domestic or foreign state, government or governmental authority, or of any political or administrative subdivision or department thereof, and all trust, participation or other certificates of, or receipts evidencing, interest in any such securities and obligation, and notes and other obligations of individuals, partnerships, associations and syndicates, and to pay for any such securities, evidences of indebtedness and obligations, in cash, or to issue in exchange therefor in payment thereof its own stock, bonds, debentures or other obligations or securities or to make payment therefor by any other lawful means of payment whatsoever.

(2) To do any and all acts and things for the preservation, protection improvement and enchancement in value of any and all such securities or evidences of interest therein, and to aid by loan, subsidy, guaranty or otherwise those issuing, creating or responsible for any such securities or evidences of interest therein as aforesaid by original subscription, underwriting, loan, participation in syndicates, or otherwise, and irrespective of whether or not such securities or evidences of interest therein be fully
31 paid or subject to further payments; and to make payment thereon as called for in advance of calls or otherwise; and to underwrite or pubscribe for the same, conditionally or otherwise, and either with a view to investment or for resale or for any other lawful purpose.

(3) To enter into, make, perform and carry out, or cancel and rescind, contracts of underwriting of the securities of any corporation, association, partnership, firm, trustee, syndicate, individual, government, state, municipality, or other political or government division or subdivision, domestic or foreign, or of any combination, organization or entity, domestic or foreign, and to act as manager of any underwriting or purchasing or selling syndicate.

(4) To lend money on call or time and with or without collateral or other security.

(5) To buy, exchange or otherwise acquire, own, hold, deal in, sell and otherwise dispose of goods, wares and merchandise, and personal property of every character and description and all interests of any character therein.

(6) To buy, exchange or in any way acquire, hold, own, possess, sell and in any way dispose of real property of every kind and description and all interests of every kind in real property.

(7) To engage in any kind of manufacturing business or process and to carry on any business or process whereby raw materials or

personal property of every kind are developed, transformed or improved into finished or more finished materials, products or property; and to buy, exchange, contract for, lease, construct and otherwise acquire, take, hold and own, and to sell, mortgage, lease or otherwise dispose of, plans for such manufacturing process and/or development; and to manage, operate, maintain and improve the same.

(8) To search for, prospect and explore for all kinds of minerals and mineral deposits, and for oil and gas; to mine, mill, drill for, convert, prepare for market and otherwise produce and deal in minerals and mineral deposits, oil and gas and the products, by-products and residual products thereof; to purchase or in
32 any manner acquire, to own, hold and operate, and to sell, lease, encumber or in any manner dispose of, minerals, mineral lands, oil or gas lands and mineral rights, and oil, gas or mineral rights of all kinds, and to construct, or in any manner acquire, to own and hold; and to sell, encumber, or in any manner dispose of, buildings, works, workshops, laboratories, machinery, power plants, pipe lines and other property necessary or convenient to that end, but not to operate as a public utility.

(9) To buy, exchange or in any way acquire, take, hold, own, operate, sell and dispose of refineries, smelters, reduction plants and any and all other plants for the extraction of minerals from ores or valuable products from subterannean or surface liquids, together with all tanks, plants, works and appurtenances necessary, proper or convenient therefor.

(10) To buy, exchange or in any way acquire, hold, own and operate telegraph and telephone lines, transportation lines by land or water, and pipe lines, necessary, useful or convenient in the judgment of the officers of this company for its own business; and to improve, maintain and operate the same; and to sell, mortgage, lease or otherwise dispose of the same.

(11) To engage in a general building and construction business; to construct houses, stores, office buildings, manufacturing plants, bridges, and buildings foundations and structures of every class and description for others and/or to so construct and erect the same on properties held, owned, or possessed by the company for sale, lease, exchange or other disposition by the company.

(12) To do engineering for businesses and industries of every kind and nature.

(13) To engage in research, experimental and laboratory work in all the various branches of science.

(14) To buy, exchange or otherwise acquire, hold, own, operate, sell and otherwise dispose of water rights and water supplies together with all necessary or convenient pipe lines reservoirs, dams, ditches and other appurtenances necessary or useful in the

33 judgment of the officers of this company for its own business; and to manage, operate, maintain, improve, extend and develop the same.

(15) To carry on a stock and bond brokers business in all its branches.

(16) To transact a general real estate agency and brokerage business, including the management of estates; to act as agent, broker or attorney in fact for any persons, partnerships or corporations in buying, selling and dealing in real property and any and every estate and interest therein; to make or obtain loans upon such property; and to supervise, manage and protect such property and all loans and all interests in and claims affecting the same.

(17) To act as brokers, agents and adjusters in the business of any kind or class of insurance in any or all of its branches.

(18) To do a general commission merchants and selling agents business; and to act as broker, agent, factor, and representative for and in every character and line of business.

(19) To apply for, obtain, register, purchase or otherwise acquire, and to own, operate, introduce, and to sell, assign or otherwise dispose of, any trade marks, trade names, patents, inventions, or any interest in the same, or any improvements, processes and discoveries used in connection with or secured under letters patent of the United States or of any sovereignty, governmental body or power whatsoever and wheresoever situate; and to use, develop and grant licenses in respect of or otherwise employ for profit any such trade marks, patents, licenses, processes, discoveries, and the like, or any such properties or rights.

(20) To purchase or otherwise acquire, maintain and operate timber and lumber yards; to purchase, prepare for market, buy, sell, import, export, market and otherwise trade and deal in logs, timber and lumber, rough and dressed, and the products thereof.

(21) To purchase, sell and deal in timber lands, cutover
34 lands and real estate; to lease, purchase or otherwise acquire, to own and hold, and to sell, lease, encumber or in any manner dispose of and to deal in timber lands, timber and logging rights and logging and turpentining, privileges; and to extract, distill and refine turpentine, resin and other forest products, and to sell or otherwise dispose of the same; to cut and remove timber, and to manufacture and sell wood pulp, wood solvents, wood fiber and wood products and by-products, and paper, paper boards, paper substitutes, boxes, containers, turpentine, stockfood, resin, naval stores and other articles made wholly or in part of wood or wood products; and to construct or in any manner acquire, to own and operate, and to sell, lease, encumber or otherwise dispose of, works, mills, plants, factories, warehouses, machinery, tram-

ways, logging roads and other facilities necessary or convenient to that end.

(22) To make contracts for and to open, keep, audit, examine or certify to the correctness of books and accounts of individuals, partnerships and corporations; and to do a general auditing and accounting business so far as may be permitted by law.

(23) To manage, counsel in respect of and direct the affairs of any business, or commercial or manufacturing undertaking of individuals, associations or corporations, and to carry on in an advisory and consultive capacity a general business in engineering, accounting, appraisement and related branches.

(24) To purchase, exchange or otherwise acquire, operate and manage ranches, farms and farm lands, and in connection therewith the doing of a general sheep, cattle and livestock-raising business; and to farm the said lands and to raise agricultural products thereon; and to raise and sell cattle and livestock of all kinds.

(25) To make, enter into and carry out any arrangements which may be deemed to be for the benefit of the corporation, with any corporation, association, partnership, firm, trustee, syndicate, individual, government, state, municipality or other political or government division or subdivision, domestic or foreign, or of any combination, organization or entity, domestic or foreign; to obtain therefrom or otherwise to acquire by purchase, lease, assignment or otherwise, any powers, rights, privileges, immunities, franchises, guarantees, grants and concessions; to hold, own, exercise, exploit, dispose of and realize upon the same and to undertake and prosecute any business dependent thereon; and to cause to be formed, to promote, and to aid in any way in the formation of any corporation, association or organization of any kind, domestic or foreign, for any such purposes.

(26) To organize or cause to be organized under the laws of the State of Michigan or of any other state, district, territory, nation, colony, province or government, a corporation or corporations for the purpose of accomplishing any or all of the objects for which the corporation or corporations is or are organized; and to dissolve, wind up, liquidate, merge or consolidate any such corporation or corporations, or to cause the same to be dissolved, wound up, liquidated, merged or consolidated.

(27) To exercise all the rights, powers and privileges whatsoever of ownership of all stocks, bonds, and other evidences of indebtedness or interest owned or held by this company, including the right to vote thereon for any and all purposes.

(28) To borrow or raise moneys for any of the purposes of the corporation and from time to time, without limit as to amount, to draw, make, accept, endorse, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures and

other negotiable or nonnegotiable instruments and evidences of indebtedness, and to secure the payment thereof and of the interest thereon by mortgage on, or pledge, conveyance or assignment in trust of, the whole or any part of the assets of the corporation, real, personal or mixed, including contract rights, whether at the time owned or thereafter acquired, and to sell, pledge or otherwise dispose of such securities or other obligations of the corporation for its corporate purposes; to confer, in any manner permitted by law, upon the holders of any bonds, debentures or obli-
36 gations of the corporation, secured or unsecured, the right to convert the principal thereof into stock of the corporation upon such terms and conditions as may be deemed advisable.

(29) To make any guaranty respecting stocks, dividends, securities, indebtedness, interest, contracts or other obligations, so far as the same may be permitted to be done by a corporation organized under the laws of the State of Michigan.

(30) To cause to be formed, merged or reorganized or liquidated, and to promote, take charge of and aid in any way permitted by law, the formation, merger, liquidation or reorganization of any corporation, association or organization of any kind, domestic or foreign; and to promote, take charge of and aid in any way permitted by law, the formation, merger, reorganization or liquidation of, any corporation, association or entity in the United States or abroad.

(31) To enter into, make, perform and carry out or cancel and rescind contracts of every kind for any lawful purposes pertaining to its business with any person, entity, syndicate, partnership, association, corporation or governmental, municipal or public authority, domestic or foreign.

(32) To have one or more offices to carry on all or any of its operations and businesses in any of the states, districts, territories or colonies of the United States and in any and all foreign states or countries; and without restriction or limit as to amount to purchase or to otherwise acquire, hold, own, mortgage, sell, convey or otherwise dispose of real and personal property of every class and description in any of the same, subject to the laws of such state, district, territory, colony or country.

(33) In general, to carry on any other business in connection with the foregoing, whether manufacturing, trading or otherwise, and to have and exercise all the powers conferred by the law of Michigan upon corporations formed under the Act hereinbefore referred to, and to do any or all of the things hereinbefore set forth to the same extent as natural persons might or could do.

37 (34) To carry on any business, work or thing whatsoever which the corporation may deem proper or convenient

in connection with any of the foregoing purposes or otherwise, or which may be calculated, directly or indirectly, to promote the interests of the corporation or to enhance the value of its property.

(35) The foregoing clauses shall be construed both as objects and powers; and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the general powers of this corporation, but are in furtherance of and in addition to, and not in limitation of, the general powers conferred by these Articles and by the laws of the State of Michigan.

It is the intention that the purposes, objects, and powers specified in this Article III and all subdivisions thereof, except as otherwise expressly provided, in nowise be limited or restricted by reference to or inference from the terms of any other clause or paragraph of this Article, and that each of the purposes, objects and powers specified in this Article shall be regarded as independent purposes, objects and powers, nor shall the expression of one thing be deemed to exclude another not expressed, although it be of like nature.

ARTICLE IV

The principal place where the company will operate is the City of Detroit, in the County of Wayne, State of Michigan.

The address of the main office in Michigan is: 2203 Fisher Building, Detroit, Michigan.

The address of the main office outside of the State of Michigan is: none.

ARTICLE V

(1) The total capital stock authorized is three hundred thousand (300 000) shares of capital stock, all without any par or nominal value; consisting of the following classes of stock without par value:

38 Class A stock: One hundred thousand (100,000) shares.
Class B stock: One hundred thousand (100,000) shares.
Class C stock: One hundred thousand (100,000) shares.

(2) The holders of Class A stock and Class B stock shall not be entitled to vote for Directors nor upon any other matter, but the sole and exclusive voting power shall belong to and be vested in the holders of Class C stock.

(3) Class A stock.—The shares of Class A stock shall be entitled to receive, when and as declared by the Board of Directors out of the surplus or net profits of the corporation, cumulative dividends at the rate of Twenty-four Dollars ($24.00) per share per annum, and no more, payable at least semi-annually on the 1st day of February & August of each year, and at such other times as the

Board of Directors may from time to time determine. Such dividends may, in the discretion of the Board of Directors be paid either in cash or—in whole or in part—in stocks or other securities, other than Fisher and Company stock, at any time held by this corporation, at the market value of such stock or securities at the time of such distribution. In the event of any liquidation or dissolution or winding up—whether voluntary or otherwise—of the corporation, the class A stock shall be entitled to receive in full out of the assets—whether capital or surplus—the sum of Six Hundred Dollars ($600) per share, plus an amount equal to all accrued but unpaid dividends thereon, before any payment shall be made to or on any of the remaining classes of stock of this corporation, except as provided in paragraph (c) of section (4) of this Article. All outstanding Class A stock shall be redeemed at a price of Six Hundred Dollars ($600) per share, plus the amount of all accrued and unpaid dividends thereon on the final termination of the corporate existence, whether the same be at the end of the term presently authorized or any lawful renewals or extensions thereof.

Class A stock may be redeemed prior thereto in whole or
39 in part from time to time, at the option of the Board of Directors, at the above redemption price. If less than all of the outstanding Class A stock is to be redeemed, the stock to be redeemed shall be selected by lot in such manner as the Board of Directors shall determine. Notice of the intention to redeem prior to the absolute date of redemption above set shall be given by mailing a notice thereof, specifying the date and place of redemption—and if less than all, the certificates to be redeemed—to each holder of record of shares to be redeemed at the last address of such holder appearing on the stock registry of this corporation.

(4) Class B stock.—(a) The shares of Class B stock of this corporation shall be entitled to receive each year in dividends the total net income—as hereinafter defined—received by this corporation from the stock of Fisher & Company, a Michigan corporation, at any time held by this corporation, up to Twenty-four Dollars ($24.00) per share per annum. If said net income from said Fisher & Company stock shall in any year exceed Twenty-four Dollars ($24.00) per share per annum on the outstanding Class B stock and the amount of said Twenty-four Dollars ($24.00) per share per annum shall have been declared and paid or set aside for all outstanding Class B shares, a dividend up to One Dollar ($1.00) per share shall be paid therefrom to the Class C stock; any remaining net income from Fisher & Company stock shall be distributed equally, share for share, between Class B and Class C stock. To determine the net income arising from said Fisher & Company stock, there shall be deducted from the gross amount of all dividends and income from said Fisher & Company

stock the amount of all taxes (including franchise or excise taxes) required to be paid by this corporation on said Fisher & Company stock and on or in respect of the aliquot portion of the assets of this corporation represented by said stock, and all taxes on the income therefrom, plus the cost and expense of handling and managing said stock by this corporation as determined by the Board of Directors of this corporation. If the net profits or surplus of this corporation be not sufficient to pay the dividends provided in this paragraph (a), the dividends herein provided for shall be paid only to an amount equal to the existing surplus or net profits of this corporation; any increase in value of Fisher & Company stock shall not be considered or included in determining the existing surplus or net profits of this corporation for this purpose.

(b) In addition to the dividends so to be paid on the Class B and Class C shares any increase in any year in the value of the shares of Fisher & Company stock then held by this corporation as such increase shall be shown by the books of said Fisher & Company at the end of the fiscal year of said Fisher & Company ending in such year of this corporation shall accrue in each year to said Class B and Class C stock of this corporation in the proportions and in the amounts which the same would have accrued and been distributed to said Class B and Class C stock of this corporation if the amount of said increase in such year had been received in cash by this corporation as dividends on said shares of said Fisher & Company stock in addition to the amount of dividends on said Fisher & Company stock actually received by this corporation in cash in such year and the last sentence of paragraph (a) of this section (4) were not operative beyond the amount of the dividends in fact received in cash from Fisher & Company. An account shall be kept on the books of this corporation which shall take up all increases in value of Fisher & Company stock held by this corporation as often as each such increase is shown by the books of said Fisher & Company as aforesaid. Said account shall at all times show the amount of such increase accrued to each of the classes of Class B and Class C stock and to each share of each of said classes then outstanding. If in any year there shall be a decrease in the value of the shares of Fisher & Company as shown on the books of Fisher & Company at the end of the fiscal year of Fisher & Company ending in such year of this corporation, such decrease shall be taken up in said account on the books of this corporation and the amount of such decrease deducted from the total net credit of the accruals of increases of Fisher & Company stock to that time shown in said account to the credit of the class B and Class C stock respectively which deduction shall be made from

each of said Class B and Class C in the proportion of the number of shares of each of said classes then outstanding, the shares of each class to be considered and treated as a unit for this purpose. The credits *accrued* pursuant to the foregoing provisions of this paragraph (b) shall not be required to be distributed in dividends but shall be required to be distributed only pursuant to paragraph (c) of this section (4).

(c) On any liquidation, dissolution or winding up of the affairs of this corporation—whether voluntary or involuntary—the Class B stock shall be entitled to receive out of said Fisher & Company stock then held by this corporation four hundred dollars ($400.00) in cash on each share of said Class B stock plus the amount of any net income from said Fisher & Company stock as net income is defined in the penultimate sentence of paragraph (a) of this section (4) which would have been distributable to said Class B stock if there had been no liquidation, dissolution or winding up. The right of the Class B stock to so receive said four hundred dollars ($400.00) and undistributed net income in the foregoing portion of this paragraph (c) described shall be free from and superior to the rights and claims of the holders of all other classes of stock of this corporation. Any then remaining value of the shares of stock in Fisher & Company held by this corporation shall be distributed to the Class B and Class C stock in the proportions and up to the amounts which the net increase in value of said Fisher & Co any stock shall to that time have accrued to said Class B and Class C stock then outstanding under the provisions of paragraphs (b) of this Section (3) and any balance over the sum of the amounts so accrued shall be distributed as assets other than Fisher & Company stock are by these Articles provided to be distributed.

Any net income as defined in the penultimate sentence
42 of paragraph (a) of this section (4) which would have been distributable to the Class C stock if there had been no liquidation, dissolution or winding up shall be distributed to said Class C stock on said liquidation, dissolution or winding up.

All of the outstanding Class B stock shall be redeemed on the termination of the corporate existence, whether the same be at the end of the term presently authorized or any lawful renewals or extensions thereof. The price on such redemption shall be the same as such shares would have been entitled to receive in distribution as aforesaid if this corporation were to be liquidated, dissolved, or wound up at the time of such redemption. The shares of Class B stock may be purchased or redeemed at the discretion of

the Board of Directors from time to time or all at one time by making the same payment to the shares so to be purchased or redeemed which such shares would have been entitled to receive in distribution as aforesaid if this corporation were to be liquidated, dissolved or wound up at the time of such redemption.

If less than all of the outstanding Class B stock is to be redeemed, the stock to be redeemed shall be selected by lot in such manner as the Board of Directors shall determine. Notice of the intention to redeem Class B stock shall be given by mailing a notice thereof, specifying the date and place of redemption—and if less than all, the certificates to be redeemed—to each holder of record of shares to be redeemed at the last address of such holder appearing on the stock registry of this corporation.

(5) Class C stock: In addition to any dividends payable out of the income of Fisher & Company stock as hereinbefore provided, dividends may be declared upon the Class C stock of this corporation out of any surplus or net profits of the corporation—except such as may arise out of or result from any income of the stock of Fisher & Company held by this corporation as provided in paragraph (a) of the preceding section (4) of this Article—
remaining after full cumulative dividends on the Class A
43 stock for all previous dividend periods shall have been paid and for the current semi-annual period shall have been declared and paid or set aside.

If and after the Class B stock hereunder shall have been redeemed, the amount of the net income from said Fisher & Company stock—as hereinbefore defined—shall be available for the payment of dividends on said Class C stock if, when, and as declared by the Board of Directors, but not to an amount which shall exceed the net profits or surplus of this corporation.

In the event of any liquidation, dissolution or winding up of the corporation, the Class C stock, after payment in full to the holders of the other classes of stock on such liquidation, dissolution or winding up, as hereinbefore provided, shall be entitled, to the exclusion of the holders of all other classes of stock hereunder, to share ratably in all remaining assets of the corporation.

(6) On any redemption of any of the Class A or Class B stock of this corporation, the corporation may deposit the aggregate redemption price with any bank or trust company, either in the City of Detroit or City of New York, named in such notice, payable in amount aforesaid to the respective record holders of the shares to be redeemed, on endorsement and surrender of their certificates in this corporation; and thereupon said holders shall

cease to be stockholders with respect to such shares, and from and after the making of such deposit said holders shall have no interest in or claim against the corporation with respect to such shares but shall be entitled only to receive said moneys from said bank or trust company without interest. Any moneys unclaimed at the end of six years from the date of the said deposit shall be repaid to the corporation. No stock so redeemed shall ever be reissued by the corporation.

(7) The total amount of stock without par value subscribed and actually paid in is two hundred eighty thousand five hundred eighty-seven (280,587) shares without nominal or par value, consisting of eighty thousand five hundred eighty-seven (80,587) shares of Class A stock, one hundred thousand (100,000) shares of Class B stock, and one hundred thousand (100,000) shares of Class C stock.

(8) The total amount of Class A stock subscribed, to wit, eighty thousand five hundred eighty-seven (80,587) shares, has been paid in property. The description and value at which each item is taken is as follows, viz:

STOCKS

(Stocks listed on public exchanges evaluated at closing prices of June 29, 1929)

Number of shares	Class of stock	Name of company	Net valuation
75,150	Common	General Motors Corp	$5,636,250.00
1,000	Common	Continental Illinois Bank & Trust Co	810,000.00
375	Common	Peoples Wayne County Bank	76,500.00
1,375		Guardian Detroit Group, Inc	206,250.00
2		Liberty National Bank	480.00
1,000	Preferred	United Aircraft & Transport Corp	85,000.00
300	Common	United Aircraft & Transport Corp	27,300.00
1,000	Common	Fokker Aircraft Corp	49,875.00
3,810	Preferred	General Chromium Corp	381,000.00
5,996	Common	General Chromium Corp	12,500.00
1,515	Common	Udylite Process Co	266,342.40
10,350	Common	Mexican Seaboard Oil Co	559,150.00
200	Common	Detroit Wax Paper Co	160,000.00
.....	$85,900 interest in stock of.	General Reduction	85,000.00
50	Common	Consumers Tobacco Co	5,000.00
556	A	Plymouth Road Development Corp	3,193.80
76	Common	Red Run Land Co	7,600.00
5	Common	Grosse Ile Land & Development Corp	500.00
		Forward	8,382,407.40

45 PLEDGED STOCKS

The blocks of stock following, each of which is taken at the value set opposite the same:

	Net valuation
Forward	$8,382,407.40

Number of shares	Class of stock	Name of company	Value amount
400,000	Common	General Motors Corp	$36,750,000.00
5,625	Common	National City Bank	2,233,125.00
			38,983,125.00
Subject to and assuming a pledge of all of said stocks en bloc to secure the sum of			$1,940,000.00
and having in the aggregate a net equity or value of			37,043,125.00
3,500	Common	Allis Chalmers	$917,000.00
19,000	Common	General Motors Corp	1,425,000.00
7,200	Common	Mexican Seaboard Oil Co	324,000.00
2,500	Common	Western Union	460,000.00
4,000	Common	Radio	336,500.00
			3,550,100.00
Subject to and assuming a pledge of said stocks en bloc to secure the sum of			$3,226,304.56
and having in the aggregate a net equity or value of			323,795.44
1,500	Common	Loose Wiles	$101,625.00
600	Common	Sparks, Withington (Old)	149,700.00
2,800	Common	General Motors Corp	210,000.00
3,600	Common	Electric Autolite	569,400.00
1,000	Common	Electric Investors	210,000.00
			1,270,425.00
Subject to and assuming a pledge of all of said stocks en bloc to secure the sum of			$1,015,000.00
and having in the aggregate a net equity or value of			255,425.00
8,500	Common	Electric Investors	$1,785,000.00
5,000	Common	General Motors Corp	375,000.00
5,000	Common	Loose Wiles	338,750.00
1,250	Common	Mexican Seaboard Oil Co	66,250.00
			2,565,000.00
Subject to and assuming a pledge of all of said stocks en bloc to secure the sum of			$777,310.00
and having in the aggregate a net equity or value of			1,787,690.00
Forward			47,792,442.84

46 COMMODITIES

Forward	$47,799,442.84
	Value amount
13,000 bales of cotton	1,407,000.00
Subject to and assuming a pledge to secure the sum of	1,250,868.28
and having a net equity or value of	156,131.72

BONDS

Amount	Percent	Name	Amount
$10,000.00	6	Bloomfield Township School	$10,309.00
50,000.00	6	Cleveland Heights School	52,755.50
15,000.00	6	Defiance Water Works	15,585.05
25,000.00	5	Ecorse School District	25,640.65
5,000.00	5	Flint	11,297.15
6,000.00	5	Flint	
15,000.00	5½	Hamtramck School	15,476.60
25,000.00	5½	Miami Conservancy	25,550.01
50,000.00	6	Muskegon Refunding	50,909.00
10,000.00	6	Owosso Water Works	10,267.50
5,000.00	5½	Norwalk Ohio School	5,740.38
16,000.00	6	Pontiac Water Works	16,411.50
54,000.00	6	River Rouge Water	55,364.00
20,000.00	6	Royal Oak School	20,716.00
7,000.00	5½	Springwells Township	7,437.60
25,000.00	5	Grand Rapids School	24,968.75
25,000.00	4½	Michigan Highway	25,641.87
15,000.00	4¾	East Lansing Water Works	15,483.00
5,000.00	5	Durand Sewers	5,173.00
10,000.00	5	Erin & Warren School District	10,299.00
		Gross total	48,352,609.01
		Surplus applied to payment of Class C stock	409.01
		Net total value applied to payment of Class A stock	48,352,200.00

(9) The total amount of Class "B" stock, to wit, 100,000 shares, has been paid in property, the description and value of which is as follows, viz:

	Valuation
A block of stock in Fisher & Company, a Michigan Corporation, consisting of the following: 1,150 shares of Class "A", 2,700 shares of Class "B", 2,800 shares of Class "C", 751 shares of Founders stock	$40,000,000.00

(10) The total amount of Class "C" stock, to wit, 100,000 shares has been paid for in property by applying thereto in payment thereof Four Hundred Nine and 01/100 Dollars ($409.01) of the securities itemized and listed in paragraph (8) of this Article; said amount of Four Hundred Nine and 01/100 Dollars ($409.01) constituting the surplus value of the said securities after deducting therefrom the amount taken in payment of all of the subscribed Class A stock as shown in said paragraph (8).

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(11) The amount of Actual capital in both cash and property which this corporatiton owned and possessed at the time of executing these Articles is Eighty-eight Million Three Hundred Fifty-two Thousand Six Hundred Nine and 01/100 Dollars ($88,352,609.01).

ARTICLE VI

The term of this corporation is fixed at thirty (30) years.

ARTICLE VII

The names of stockholders, their residences and shares subscribed by each are:

Name and address	Class A	Class B	Class C
Fred J. Fisher, 2203 Fisher Bldg., Detroit, Michigan	71,194	100,000	93,619
Burtha M. Fisher, 54 Arden, Detroit, Michigan	9,393		6,379
Andrew E. Baldwin, 2202 Fisher Bldg., Detroit, Michigan			1
Leo M. Butzel, 2288 First Nat'l Bank Bldg., Detroit, Michigan			1
	80,587	100,000	100,000

48 ARTICLE VIII

The names and addresses of officers and directors for the first year of the corporation's existence are as follows:

Name and address	*Office*
Fred J. Fisher, 2203 Fisher Bldg., Detroit, Michigan.	President and Director.
Burtha M. Fisher, 54 Arden, Detroit, Michigan.	Director.
Andrew E. Baldwin, 2202 Fisher Bldg., Detroit, Michigan.	Vice-President and Director.
Leo M. Butzel, 2288 First Nat'l Bank Bldg., Detroit, Michigan.	Director.
Horace Maynard, 14th Flr., General Motors Bldg., Detroit, Michigan.	Secretary and Treasurer.

ARTICLE IX

Special statements pertaining to the primary organization of this corporation and not included in the foregoing requirements:

(a) None of the stock of Fisher & Company of any kind or class at any time held by this corporation shall be sold, mortgaged or pledged, or contract for any of the same be made, or any interest in any of the same be created in any person, firm or corporation without the consent in writing of at least two-thirds of the outstanding Class B stock of this corporation.

(b) Except as hereinafter provided in this paragraph; no holder of any stock of this corporation shall be entitled as of right to purchase or subscribe for any part of any unissued stock of this corporation, or any new or additional stock of any class to be issued by reason of any increase in the authorized capital stock of
49 this corporation, or of any issue of securities of the corpora-

tion convertible into stock, whether such stock or securities be issued for money or for a consideration other than money. When any such unissued stock or any such additional authorized issue of new stock or such securities convertible into stock are to be issued and disposed of, it may be issued and disposed of by the Board of Directors to such persons, firms, corporations or associations and upon such terms as the Board of Directors may in their discretion determine without offering to the stockholders then of record or any class of stockholders any thereof on the same terms or any terms; provided however, that no Class C stock shall be issued or sold except after having first been offered for subscription to the holders of the then outstanding Class C stock according to their respective shares.

(c) In the absence of fraud no contract or other transaction with any other corporation or any individual, association or firm shall be in any way affected or invalidated by the fact that any of the directors of the corporation are interested in such other corporation, association or firm, or personally interested in such contract or transaction, nor shall any director so interested be liable to account to the corporation for any profit made by him from or through any such contract or arrangement so adopted by the Board of Directors or which may be ratified and approved by the holders of the Class C stock, by reason of such director holding such office or the fiduciary relationship thereby established. Any director of this corporation may vote upon any contract or other transactions between this corporation and any subsidiary or affiliated corporation without regard to the fact that he is also a director of such subsidiary or affiliated corporation.

(d) Any contract, transaction or act of the corporation or of the Board of Directors, which shall be ratified by a majority of a quorum of the voting stock at any annual meeting or at any special meeting called for such purpose shall be as valid and binding as though ratified by every stockholder of the corporation; provided, however, that any failure of the voting stockholders to approve or ratify such contract, transaction or act, when and if submitted, shall not be deemed in any way to render the same invalid nor to deprive the directors or officers of their right to proceed with such contract, transaction or act.

(e) The Directors may from any funds available, after all dividend payments on the Class A and Class B stocks have been made or set aside for the current semi-annual period, devote so much of the remaining available funds of the company—other than any net income arising from Fisher & Company stock held by this corporation—to one or more religious, charitable, scientific,

literary, or educational purposes, and to this end may make payment of all or any part of such funds to such corporation, trust, community chest, fund, foundation, post or organization of war veterans, institution, church, school, association, or person, or any number of the foregoing, as in the sole discretion of the Board of Directors is best qualified to carry out the purposes at the time sought to be fulfilled or accomplished. The matters stated in this paragraph (e) of Article IX shall be construed as objects and purposes of this corporation as well as stating the powers of the Board of Directors with respect to such objects and purposes.

(f) Authority is hereby specifically conferred upon the Board of Directors of the corporation at any time and from time to time, to mortgage, pledge or hypothecate the property of the corporation, in whole or in part,—subject to the limitations respecting Fisher & Company stock, set forth in paragraph (a) of this Article—for the purpose of securing any obligation of the corporation that may from time to time be created or incurred.

In witness whereof, we, the parties designated, as provided
51 by law, by the parties associating as under Article VII of these Articles, for the purpose of giving legal effect to these Articles, hereunto sign our names this 26th day of July, A. D. 1929.

FRED J. FISHER.
BURTHA M. FISHER.
ANDREW E. BALDWIN.
LEO M. BUTZEL.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 26th day of July, A. D. 1929, before me, a Notary Public in and for said county, personally appeared Fred J. Fisher, Burtha M. Fisher, Andrew E. Baldwin and Leo M. Butzel, known to me to be the persons named in and who executed the foregoing instrument, and severally acknowledged that they executed the same freely and for the intents and purposes therein mentioned.

[SEAL] IRMA J. PACEY, *Notary Public*,
Wayne County, Michigan.

My commission expires Feb. 20, 1931.

STATE OF MICHIGAN,
County of Wayne, ss:

Fred J. Fisher, Andrew E. Baldwin and Burtha M. Fisher, being duly sworn, do depose and say that they are three of the organizers of Senior Investment Corporation, whose Articles of Association are hereto attached; that they know the property described in Article V of such Articles of Association and taken in payment for capital stock, and that the same has been actually transferred to such corporation, and further say that said prop-

erty is of the actual value of Eighty-eight Million Three Hundred Fifty-two Thousand Six Hundred Nine and 01/100 Dollars ($88,352,609.01) and that eighty thousand five hundred eighty-seven (80,587) shares of Class A stock, and that one hun-
52 dred thousand (100,000) shares of Class B stock and one hundred thousand (100,000) shares of Class C stock have been issued in payment for the same.

And further say not.

FRED J. FISHER.
BURTHA M. FISHER.
ANDREW E. BALDWIN.

Subscribed and sworn to before me this 26th day of July, A. D. 1929.

[SEAL] IRMA J. PACEY, *Notary Public,*
Wayne County, Michigan.

My commission expires Feb. 20, 1931.
Filed July 29th, 1929.

United States of America

(State seal)

THE STATE OF MICHIGAN

DEPARTMENT OF STATE

To all to whom these presents shall come:

I, John S. Haggerty, Secretary of State of the State of Michigan and Custodian of the Great Seal thereof, Do Hereby Certify that the annexed copy of articles of association of the Senior Investment Corporation has been compared by me with the record on file in this Department and that the same is a true copy thereof, and the whole of such record.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State at the Capitol, in the City of Lansing, this 31st day of July, A. D. 1929.

[SEAL] JOHN S. HAGGERTY,
Secretary of State.

53 CERTIFICATE OF AMENDMENT TO THE ARTICLES OF ASSOCIATION OF THE SENIOR INVESTMENT CORPORATION

P. O. Address—2402 Fisher Building, Detroit, Michigan

We, the undersigned, being the president and secretary of the Senior Investment Corporation, a corporation organized under

the provisions of Act No. 84 of the Public Acts of 1921, as amended, do hereby certify, as required by Section 9, Chap. 1, Part II of said act and by section 43, of Act. No. 327 of the Public Acts of the State of Michigan for the year 1931:

That a meeting of the stockholders of said corporation expressly called for the purpose of amending its articles of association and held at the office of said company on the 30th day of November, A. D. 1931, it was resolved, by the vote of the holders of all of the shares of each class of shares entitled to vote and all of the shares of each class whose right, privileges or preferences are so changed that the Articles of Association relating to capital stock be amended as follows:

(a) By striking out that paragraph of Article V captioned "(3) Class A Stock" and inserting in lieu thereof a paragraph to be captioned "(3) Class A Stock" which shall read as follows:

"ARTICLE V

"(3) *Class A stock.*—(a) The shares of Class A stock shall be entitled to receive, when and as declared by the Board of Directors out of the surplus or net profits of the corporation, cumulative dividends at the rate of Twenty-Four Dollars ($24.00) per share per annum, and no more, payable at least semiannually on the 1st days of February and August of each year, and at such other times as the Board of Directors may from time to time determine.

Such dividends may, in the discretion of the Board of Di-
54 rectors be paid either in cash or—in whole or in part—in stocks or other securities, other than Fisher and Company stock, at any time held by this corporation, at the market value of such stock or securities at the time of such distribution. In the event of any liquidation or dissolution or winding up—whether voluntary or otherwise—of the corporation, the Class A stock shall be entitled to receive in full out of the assets—whether capital or surplus—payable either in assets of the corporation other than cash or in cash or partly in cash and partly in such assets, the sum of Six Hundred Dollars ($600.00) per share, plus an amount equal to all accrued but unpaid dividends thereon before any payment shall be made to or on any of the remaining classes of stock of this corporation, except as provided in paragraph (c) of section (4) of this Article. All outstanding Class A stock shall be redeemed on the final termination of the corporate existence, whether the same be at the end of the term presently authorized or any lawful renewals or extensions thereof, at a price of Six Hundred Dollars ($600.00) per share, plus the amount of all accrued and unpaid dividends thereon, all payable either in assets of the corporation other than cash or in cash or partly in cash and partly in

such assets as may be agreed between the shareholder whose shares are to be redeemed and the Company, subject to the approval of the holders of the Class A shares as hereinafter specified.

Class A stock may be redeemed, in whole or in part, at any time prior to the absolute date of redemption fixed in the preceding paragraph, from time to time, at the option of the Board of Directors at such price per share as may be agreed between the shareholder whose shares are to be redeemed and the Company; provided, however, that such agreed price shall in no event exceed Six Hundred Dollars ($600.00) per share and that such redemption and the price agreed to be paid shall in each instance be approved in writing by the holders of not less than eighty percent (80%) of the Class A shares then outstanding; and there shall be added to such agreed redemption price the amount of all accrued and unpaid dividends on the shares to be redeemed. The
55 agreement and approval for such optional redemption price may provide that such optional redemption price may be paid in assets of the corporation other than cash or in cash or partly in such assets and partly in cash. If less than all of the outstanding Class A stock is to be redeemed, the stock to be redeemed shall be selected in such manner as the Board of Directors may determine. In the event it shall be determined to pay for the redemption of any or all of the shares of the Class A stock at any time outstanding either entirely or partially in assets of the corporation other than cash, the assets so to be utilized and the credit to be received therefor on the redemption price shall be fixed by agreement between the Company and the shareholder whose Class A shares are to be redeemed, subject at all times, however, to the approval in writing of the holders of not less than eighty percent (80%) of the Class A shares then outstanding. Notice of the intention to redeem prior to the absolute date of redemption above set shall be given by mailing notice thereof, specifying the date and place of redemption—and if less than all, the certificates to be redeemed—to each holder of record of shares to be redeemed at the last address of such holders appearing on the stock registry of this corporation."

and

(b) By striking out paragraph (6) of Article V and inserting in lieu thereof a paragraph (6) which shall read as follows:

"(6) On any redemption of any of the Class A or Class B stock of this corporation, the corporation may deposit the aggregate redemption price or the assets of the corporation other than cash to be utilized in such redemption with any bank or trust company, either in the City of Detroit or in the City of New York named in such notice, payable or deliverable as aforesaid to the respective record holders of the shares to be redeemed, on endorsement and

surrender of their certificates in this corporation; and thereupon said holders shall cease to be stockholders with respect to such shares and from and after the making of such deposit said
56 holders shall have no interest in or claim against the corporation with respect to such shares but shall be entitled only to receive said moneys or assets other than cash from said bank or trust company without interest. Any moneys or assets other than cash unclaimed at the end of six (6) years from the date of the said deposit shall be repaid or redelivered to the corporation. No stock so redeemed shall ever be reissued by the corporation."

In witness whereof, we hereunto sign our names this 30th day of November, A. D. 1931.

F. J. FISHER, *President.*
HORACE S. MAYNARD, *Secretary.*

STATE OF MICHIGAN,
County of Wayne, ss:

On this 30th day of November, A. D. 1931, before me, a Notary Public in and for said County, personally appeared Fred J. Fisher and Horace S. Maynard, known to me to be the persons who executed the foregoing instrument and severally acknowledged that they executed the same freely and for the intents and purposes therein mentioned.

[SEAL] IRMA J. PACEY, *Notary Public,*
Wayne County, Michigan.

My Commission Expires: Feb. 13, 1935.

Joint Exhibit A–3

AGREEMENT AND PLAN OF REORGANIZATION AND RECAPITALIZATION OF SENIOR INVESTMENT CORPORATION

This Agreement and Plan of Reorganization and Recapitalization entered into this 23rd day of August, A. D. 1933, by
57 and between Senior Investment Corporation, a corporation organized and existing under the laws of the State of Michigan (hereinafter sometimes referred to as the Old Corporation), party of the first part, Senior Corporation, a corporation to be organized under the laws of the State of Delaware (hereinafter sometimes referred to as the New Corporation), party of the second part, and Fred J. Fisher, Burtha M. Fisher and Andrew E. Baldwin, all of Detroit, Michigan, being the owners of all of the outstanding capital stock of the Old Corporation, parties of the third part, witnesseth:

Whereas, the parties hereto desire to reorganize and recapitalize Senior Investment Corporation, pursuant to the Plan of Reorganization and Recapitalization hereinafter set out (sometimes

hereinafter referred to as the Plan), said reorganization to be effected by the transfer of certain of the assets of said Senior Investment Corporation to said New Corporation and the issuance in exchange therefor of the capital stock of said New Corporation to the stockholders of the Old Corporation pro rata in accordance with their holdings of stock in the Old Corporation pursuant to Part I of the Plan, and said recapitalization to be effected by the reduction in the capital and capital stock of the Old Corporation and the surrender and cancellation of the outstanding Class B stock of the Old Corporation, pursuant to Part II of the Plan.

Now, therefore, for and in consideration of the mutual covenants and agreements of the parties hereto as hereinafter set forth, and the sum of One Dollar ($1.00) by each of the parties hereto to the other in hand paid, receipt whereof by them is hereby acknowledged, it is mutually agreed and understood as follows:

a. The parties hereto adopt and agree to carry out and consummate the Plan of Reorganization and Recapitalization of Senior Investment Corporation, a Michigan Corporation, in accordance with the terms and provisions of said Plan of Reorganization and Recapitalization as hereinafter set out as follows, to-wit:

58 PLAN OF REORGANIZATION AND RECAPITALIZATION OF SENIOR INVESTMENT CORPORATION, A MICHIGAN CORPORATION

PART I

(A) Organize a corporation under the name of Senior Corporation under the laws of the State of Delaware with an authorized capital stock of 300,000 shares consisting of 100,000 shares of Class A stock of the par value of $10.00 per share, 100,000 shares of Class B stock of the par value of $10.00 per share, and 100,000 shares of Class C stock without par value.

(B) Cause the Old Corporation to transfer to the New Corporation the assets and property of the Old Corporation, specified on Annex A hereto, at the values stated in said Annex A.

(C) Cause the New Corporation, in exchange for the transfer of said assets and property, to issue to the stockholders of the Old Corporation 71,573 shares of said Class A stock, 100,000 shares of said Class B stock, and 100,000 shares of said Class C stock, of the New Corporation to the holders of the Class A stock, Class B stock, and Class C stock, of the Old Corporation, at the rate of one share of Class A stock, Class B stock, and Class C stock, of the New Corporation for each share respectively of Class A stock, Class B stock, and Class C stock, of the Old Corporation held by such stockholders.

(D) In connection with the organization of the New Corporation and issuance of its said Class A stock, Class B stock, and Class C stock, as aforesaid, the Certificate of Incorporation of said New Corporation shall set out the powers, preferences and rights and the qualifications, limitations or restrictions thereof of the said Class A stock, Class B stock, and Class C stock, of the New Corporation in such manner as to substantially pre-
59 serve the powers, preferences and rights, and the qualification, limitations or restrictions thereof which the holders of the Class A stock, Class B stock, and Class C stock, of the Old Corporation now have as affecting the assets and property of the Old Corporation, specified in Annex A, to be transferred to the New Corporation, pursuant to Part I of the Plan.

PART II

Upon the consummation of Part I of the Plan of Reorganization and Recapitalization as above set out—

(A) Amend the article of Incorporation of the Old Corporation so as to—

(1) Reduce the capital of the Old Corporation by changing the authorized capital stock of the Old Corporation to 200,000 shares of stock consisting of 100,000 shares of Class A stock with par value of $5.00 per share, and 100,000 shares of Class C stock with par value of $1.00 per share.

(2) Set out the rights, voting power, preferences and restrictions of the said Class A stock and Class C stock in such manner as to substantially preserve the rights, voting power, preferences and restrictions which the holders of the Class A stock and Class C stock of the Old Corporation now have as affecting the assets and property which the Old Corporation will retain after the transfer to the New Corporation of the assets and property of the Old Corporation specified in Annex A.

(B) Cause the holders of the Class B stock of the Old Corporation to surrender the same for cancellation, and provide for the appropriate stamping of the certificates of Class A stock and Class C stock now outstanding to evidence the change in the capital structure of the Old Corporation caused by the consummation of this Plan.

60 b. The parties hereto agree to cause to be held the necessary meetings of the stockholders and directors of the Old Corporation and the necessary resolutions to be adopted thereat adopting and ratifying the Plan of Reorganization and Recapitalization as above set out, confirming the action of the officers of the Old Corporation in executing the same and agreeing to become a party thereto, authorizing the acts and things required to be

done by said Plan of Reorganization and Recapitalization, authorizing the proper officers of the Old Corporation to make or consent to any amendments of or additions to said Plan by said officers deemed necessary or advisable to fully carry out the intent and purpose of said Plan and generally authorizing and directing the proper officers of the Old Corporation to do all things and to execute any and all papers and documents by the said officers deemed necessary or advisable to consummate and put into full force and effect said Plan of Reorganization and Recapitalization and any amendments thereof or additions thereto.

c. The parties hereto agree to cause to be organized the New Corporation as provided by Part I of the Plan of Reorganization and Recapitalization and to cause to be held the necessary meetings of the stockholders and directors of said New Corporation and the necessary resolutions to be adopted thereat, adopting and ratifying the Plan of Reorganization and Recapitalization as above set out, agreeing to be and become a party thereto with the same force and effect as if it had executed the same in the first instance, authorizing the acts and things required to be done by said Plan of Reorganization and Recapitalization, including the issuance of its shares of stock as provided in the Plan, and authorizing the proper officers of the New Corporation to make or consent to any amendments of or additions to said Plan by said officers deemed necessary or advisable to fully carry out the intent and purpose of said Plan and in general authorizing and directing the proper officers of the New Corporation to do all things and to execute any and all papers and documents by said officers
61 deemed necessary or advisable to consummate and put into full force and effect said Plan of Reorganization and Recapitalization.

d. It is mutually understood and agreed by the parties hereto that all costs and expenses of consummating said Plan of Reorganization and Recapitalization including filing and franchise fees and taxes, stamp taxes, and attorneys' fees shall be borne and paid by the Old Corporation and the New Corporation in the proportions as the values of the assets and property transferred to the New Corporation and the assets and property retained by the Old Corporation bear to the total value of all the assets and property of the Old Corporation.

e. It is mutually understood and agreed by the parties hereto that it is the intention of the parties hereto that upon the consummation of the said Plan of Reorganization and Recapitalization the sum total of the rights, powers and privileges of the

holders of the Class A stock, Class B stock, and Class C stock, of the New Corporation and the rights, powers and privileges of the holders of Class A stock and Class C stock of the Old Corporation shall be substantially equal to the rights, powers and privileges which the holders of Class A stock, Class B stock, and Class C stock of the Old Corporation have prior to the consummation of such Plan as affecting the assets and property which the Old Corporation has prior to the consummation of said Plan.

In witness whereof the parties of the first and second parts have caused this agreement to be executed in their respective corporate names, and their respective corporate seals to be hereunto affixed and duly attested by their respective corporate officers thereunto duly and lawfully authorized, and the parties of the third part have hereunto set their hands and seals, all as of the day and year first above written.

SENIOR INVESTMENT CORPORATION,
By FRED J. FISHER, *Its President.*
By HORACE S. MAYNARD, *Its Treasurer.*

62 Signed, sealed and delivered in the presence of:
JOHN M. DOOLEY,
JOHN C. MOONS.

SENIOR CORPORATION,
By FRED J. FISHER,
Its President.
By HORACE S. MAYNARD,
Its Treasurer.

Signed, sealed and delivered in the presence of:
JOHN M. DOOLEY,
AGNES C. SPECK.

[L. S.] FRED J. FISHER.
[L. S.] BURTHA M. FISHER.
[L. S.] ANDREW E. BALDWIN.

JOHN M. DOOLEY,
JOHN C. MOONS,
H. S. M., *Secy.*

63 ANNEX A

Cash	$2,000,000.00
10,500 Shares of Class A Stock of Fisher & Company, a Michigan Corporation.	
50,030 Shares of Class B Stock of Fisher & Company, a Michigan Corporation.	
28,000 Shares of Class C Stock of Fisher & Company, a Michigan Corporation.	

751 Shares of Founders Stock of Fisher & Company, a Michigan Corporation		$8,000,000.00
The following assets as shown on the books of Senior Investment Corporation as of June 30, 1933:		
Amounts due from:		
Alfred J. Fisher	$71,005.54	
Lawrence P. Fisher	1,130,018.49	
William A. Fisher	228,703.20	
Fisher & Company	31,272.91	
Fred J. Fisher	1,100,000.00	
Edward F. Fisher	34,851.87	
The Six Messrs. Fisher by virtue of payments on joint and several note at the Bankers Trust Company, New York, N. Y	501,108.63	
	3,096,960.73	
Fred J. Fisher	5,862,747.40	
Burtha M. Fisher	1,814,386.22	
Sundry Accounts Receivable	64,231.28	10,838,325.63
Total		29,838,325.63

65 *Joint Exhibit A–4*

Senior Investment Corporation, Balance Sheet, June 30, 1933, Before the Reorganization

ASSETS

	Book value		Market value	
	Detail	Amount	Detail	Amount
Cash in banks and on hand:				
New York banks (open)	$2,217,344.29		$2,217,344.29	
Michigan banks (open)	135,668.29		135,668.29	
Cash on hand	26,266.74		26,266.74	
Together	2,379,279.32		2,379,279.32	
Add—closed Detroit banks	241,197.89	$2,620,477.21	150,000.00	$2,529,279.32
Equity in broker's accounts:				
Stocks per list (short) (Ex. 2)	296,240.34		687,862.50	
Cash balance at brokers	1,066,680.90	770,440.46	1,066,680.90	378,818.40
Marketable stocks and bonds:				
Listed common stocks (Ex. 3)	7,608,299.44		3,574,291.66	
Listed preferred stocks (Ex. 4)	99,307.70		111,612.70	
Bonds—industrial, utilities, railroad, and foreign (Ex. 5)	1,394,540.97		1,093,426.22	
Bonds—Municipal (Ex. 6)	416,939.00		396,370.00	
Bonds—Federal Farm Loan	44,750.00	9,563,836.91	46,000.00	5,191,680.38
Other investments:				
Stocks not listed (Ex. 7)	959,999.00		820,004.40	
Fisher & Company	18,325,000.00		8,000,000.00	
Real Estate & Real Estate Syndicates (Ex. 8)	126,475.97	9,411,442.01	50,000.00	8,870,004.40
Notes and accounts receivable:				
Fisher Brothers and Fisher & Company (Ex. 9)	3,096,960.73		3,096,960.73	
Fred J. Fisher	5,862,747.40		5,862,747.40	
Burtha M. Fisher	1,814,386.22		1,814,386.22	
Sundry accts. receivable (Ex. 10)	64,231.28	10,838,325.63	64,231.28	10,838,325.63
Properties:				
Office furniture and fixtures	15,255.42		15,255.42	
Less—depreciation	5,299.64	9,955.78	5,299.64	9,955.78
Deferred charges:				
Prepaid taxes		8,384.20		8,384.20
		33,222,802.21		27,826,448.11

Senior Investment Corporation, Balance Sheet, June 30, 1933, Before the Reorganization—Continued

LIABILITIES

	Book value		Market value	
	Detail	Amount	Detail	Amount
Current liabilities:				
Provision for funds on deposit which were withdrawn from General Motors Liquidation Account at Brokers	$1,000,000.00		$1,000,000.00	
Provision for Federal Income Tax on 1933 profits to date	305,622.03		305,622.03	
Sundry liabilities	3,873.30	$1,309,495.33	3,873.30	$1,309,495.33
Land contracts payable		10,806.00		10,806.00
Capital:				
Authorized:				
Class A 100,000 shares				
Class B 100,000 shares				
Class C 100,000 shares				
Issued:				
Class A 71,573 shares	12,943,800.00		12,943,800.00	
Class B 100,000 shares	10,000,000.00		10,000,000.00	
Class C 100,000 shares	1.00	22,943,801.00	1.00	22,943,801.00
Deficit	13,260,431.10		13,260,431.10	
Balance Jan. 1, 1933—Add net loss sustained during 6 mos. ended 6-30-33 (Ex. 12)	7,780,802.96	21,041,234.12	7,780,802.96	21,041,234.1
Depreciation of securities:				
Difference between book value of investments and market value at June 30, 1933				33,309,114.0
		33,222,802.25		57,529,418.1

67. *Senior Investment Corporation, balance sheet after reorganization per books, as at June 30, 1933*

ASSETS

Demand deposits and cash on hand		$979,279.27
Equity in broker's accounts:		
Cash balances at brokers	$1,026,680.90	
Less—Stocks sold short at sale prices	256,240.50	
		770,440.40
Marketable stocks and bonds:		
Listed common stocks	7,918,289.42	
Listed preferred stocks	99,367.50	
Bonds—Industrial, utilities, railroad, and foreign	1,394,540.84	
Bonds—Municipal	410,933.00	
Bonds—Federal Farm Loan	44,770.00	
		9,868,899.76
Other investments:		
Stocks not listed	959,966.64	
Real estate and real estate syndicates	126,475.97	
		1,086,442.61
Claims against receivers of closed banks		241,297.85
Office furniture and fixtures, less allowance for depreciation		9,967.78
Prepaid taxes		8,884.20
		12,059,539.56
Note "A."—Balances before reorganization:		
Deduct:		
Cost of assets transferred to senior corporation		51,193,325.63
Deficit transferred to senior corporation		14,780,044.16

67 Senior Investment Corporation, balance sheet after reorganization per books as at June 30, 1933—Continued

LIABILITIES

Provision for funds on deposit which were withdrawn from General Motors liquidation account at brokers	$1,000,000.00
Provision for federal income tax	305,622.03
Sundry liabilities	3,873.30
Land contract payable	10,800.00
Total liabilities	1,320,295.33

	Capital authorized	Shares issued	
Paid-in capital, segregated as follows:			
Capital stock:			
Class "A"	$100,000	$71,573	$357,865.00
Class "C"	100,000	100,000	100,000.00
			457,865.00
Contributed capital			5,594,593.19
Reserve for depreciation of assets on reorganization			4,686,783.06
Reserve for anticipated earnings			6,444,239.96
Total paid-in capital			17,183,481.21
Deficit as at June 30, 1933			6,444,239.96
Total capital + (Note A)			10,739,241.25
			12,059,536.58

	Paid-in capital	Deficit	Capital
	$82,943,801.00	$21,041,234.12	$61,902,566.88
	65,760,319.79	14,596,994.16	51,163,325.63
Balances after reorganization	17,183,481.21	6,444,239.96	10,739,241.25

69 SENIOR CORPORATION

Balance sheet after reorganization per books as at June 30, 1933

ASSETS

Demand deposits in banks		$2,000,000.00
Notes and accounts receivable:		
Fisher Brothers and Fisher & Company	$3,096,960.73	
Fred J. Fisher	5,862,747.40	
Bertha M. Fisher	1,814,386.22	
Sundry Accounts	64,231.28	
		10,838,325.63
Stock of Fisher & Company		8,000,000.00
		20,838,325.63

CAPITAL

Capital Stock:	Shares authorized	Shares issued	
Class A	100,000	71,573	$715,730.00
Class B	100,000	100,000	1,000,000.00
Class C	100,000	100,000	
			$1,715,730.00
Contributed capital			19,122,595.63
Reserve for anticipated earnings			14,596,994.26
			35,435,319.89
Less, deficit transferred from Senior Investment Corporation			14,596,994.26
			20,838,325.63

Joint Exhibit A-5

Senior Investment Corporation, work sheet in connection with reorganization and transfer of certain assets to Senior Corporation, August 28, 1933

	Michigan Corporation as at June 30th, 1933				Transfer to New Delaware Corp.	Federal transfer stamps	Reserve for depreciation of assets
	Book		Market				
	Detroit	Outside	Detroit	Outside			
ASSETS							
Cash in banks	$135,698.26	$2,217,344.26	$135,698.26	$2,217,344.26	$2,000,000.00	0	
Cash on hand	2,266.75		2,266.75				
Closed banks	291,197.85		150,000.00				$91,197.85
Stocks (short)	265,240.50		687,862.50				391,622.00
Cash balance at brokers	1,703,680.93		1,703,680.93				
Listed common stocks:							
General Motors	6,207,500.00		2,037,337.50				4,210,162.50
Others	810,799.49		634,954.43				176,184.64
Listed preferred stocks	469,307.50		456,612.50				12,305.00
Bonds "industrial," etc	1,304,540.99		1,003,426.25				301,114.74
Bonds "municipal"	417,939.09		367,350.00				50,589.00
Bonds "Federal Farm Loan"	44,750.00		43,500.00				1,250.00
Stock not listed	554,966.04		415,004.40				139,961.64
Fisher & Company	38,325,000.00		8,000,000.00		8,000,000.00	$3,931.20	(1)
Real Estate & Syndicates	126,475.97		50,000.00				76,475.97
Amounts due Fisher Bros. and Fisher & Company	3,105,960.73						
Fred J. Fisher	5,502,747.40						
Burton M. Fisher	1,814,586.22		10,838,325.63		10,838,325.63	0	
Sundry accounts receivable	64,231.28						
Office furniture and fixtures	9,955.78		9,955.78				
Prepaid taxes	8,384.29		8,384.29				
	61,005,417.95	2,217,344.26	25,[illegible]3.89	2,217,344.26	20,838,325.63		5,071,414.06
			27,[illegible]48.15		Michigan franchise tax after reorganization		$14,169.57
			20,838,325.63		Memos: (Two Million Dollar Corporation organization fee (Delaware Company):		
LIABILITIES			6,988,122.52		Federal original issue stamps		1,784.27
					Delaware organization fee (300,000 shares)		760.00
					Delaware franchise fee*		775.00
Funds withdrawn G. M. liquidation A/C	1,000,000.00				stamp tax on transferring Fisher & Co. stock		3,931.20
Reserve for Federal taxes	305,622.03				Michigan Corporation—Amendment to Charter (Nominal).		
Land contracts payable	10,800.00		1,340,265.33				
Sundry liabilities	3,873.30				*If no business transacted only "0" payable.		
	1,320,295.33		5,6[illegible]7.19				

(1) All issued to F. J. Fisher.

73 *Joint Exhibit A-6*

Charter Provisions

DIVIDENDS

Originally all assets other than Fisher & Company stock were allocated to the Class A stock. For the purpose of reorganization, assets other than Fisher & Company stock, of the market value of $12,838,325.63 are transferred to the New Delaware Corporation and assets other than Fisher & Company stock of the market value of $5,667,827.19 are retained by the Old Corporation.

		Percent
To New Delaware Corporation	$12,838,325.63	.6937328
Retained by Old Corporation	5,667,827.19	.3062672

In the Old Corporation Class A stock is entitled to $24.00 per share cumulative dividends out of income from assets other than Fisher & Company stock. To maintain the same rights on reorganization the Class A stock in the New Delaware Corporation should be entitled to .6937328% of $24.00 or $16.65 per share of cumulative dividends, and Class A stock in the Old Michigan Corporation should be entitled to .3062672% of $24.00 or $7.35 per share of cumulative dividends.

The Class B stock in the New Delaware Corporation should be entitled to all the net income on the Fisher & Company stock up to $24.00 per share and should be entitled to all the rights to which the Class B stock in the Old Corporation is entitled. Also the allocation of rights as to Fisher & Company stock as between Class A, Class B, and Class C stock in the Old Corporation should be carried out in the Charter of the New Delaware Corporation.

CLASS C STOCK

In the present corporation after dividends up to $24.00 per share on the Class B stock has been paid out of the net income received from the Fisher & Company stock, a dividend of $1.00 per share is to be paid on Class C stock, and the balance of such net income is distributed equally share for share between the Class B stock and Class C stock. These provisions should be carried over into the Articles of Incorporation of the New Delaware Corporation.

74 In the present corporation, in addition to any dividends payable out of the income from Fisher & Company stock, dividends may be declared upon the Class C stock out of a surplus or net profits of the corporation resulting from assets other than Fisher & Company stock after full cumulative and current

dividends on Class A stock have been paid. Same provisions should be included in the Articles of Incorporation of the New Delaware Corporation. The cumulative dividends required to be paid in such event shall be at the rate of $16.65 per share of Class A stock of the New Delaware Corporation from July 29, 1929 to the date of reorganization. In the Old Corporation, the Charter should provide that such dividend may be declared on Class C stock after the cumulative and current dividend on Class A stock have been paid. The cumulative dividends required to be paid in such event shall be at the rate of $7.35 per share of Class A stock of the Old Corporation from July 29, 1929 to the date of reorganization.

In the present Corporation, it is provided that after Class B stock is redeemed, the net income from Fisher & Company stock shall be available for the payment of dividends on Class C stock, but not to an amount which shall exceed the net profits or surplus of the corporation. The same provision shall be made in the Articles of Incorporation of the New Delaware Corporation.

REDEMPTION

The Charter of the New Delaware Corporation and the Old Michigan Corporation should provide that Class A and Class B stock may be redeemed at such prices as may be determined by the Board of Directors with consent of 80% of such stock outstanding, but in no event at a price in excess of the amount to which such classes of stock are entitled to on liquidation or dissolution. Provided, also that such Class B stock may be redeemed in cash or Fisher & Company stock, or partly in cash and partly in Fisher & Company stock, the value of such Fisher & Company stock to be taken at the book value thereof as shown by Fisher & Company. Provide that Class A stock upon redemption may be paid for by cash or by assets or partly by cash and partly by assets.

LIQUIDATION OR DISSOLUTION

In the present Corporation, on liquidation or dissolution, Class A stock is entitled to $60.00 per share out of the assets other than Fisher & Company stock. On reorganization, the New Delaware Corporation will have .6937328 of the assets other than Fisher & Company stock of the present Corporation (on the basis of market value) and the Old Michigan Corporation will have .3062672 of such assets. On reorganization Class A stock of the New Delaware Corporation should be entitled to $416.24 per share and Class A stock of Old Michigan Corporation should be entitled to $183.76 per share. The present provisions as to liquidation and dissolu-

tion contained in the Charter of the present Corporation should be carried over into the Articles of the New Delaware and the amended articles of the Old Michigan Corporations. Provide that on liquidation or dissolution of New Delaware Corporation such price may be paid in assets other than Fisher & Company stock or in cash or partly in cash and partly in such assets. In Old Corporation provide that on liquidation or dissolution the price provided for may be paid in assets or cash or partly in assets and partly in cash.

As to Class B stock in the New Delaware Corporation, the Charter should provide that Class B shares should be entitled to receive shares of Fisher & Company stock in kind up to $400.00 per share of Class B stock outstanding or in cash from the proceeds of Fisher & Company stock up to $400.00 per share or partly in cash out of the proceeds of Fisher & Company stock and partly in Fisher & Company stock up to $400.00 per share, the value of such Fisher & Company stock to be taken at the book value thereof as shown by Fisher & Company. This right of the Class B stock is superior to all other Classes of stock.

In present Corporation provision is made for crediting increases in value of Fisher & Company stock as between Class B and
76 C stocks. Provide in New Delaware Corporation for crediting such increase after Fisher & Company stock has a value of $38,325,000.00. Provide also that $1,675,000 of the capital surplus shall be allocafed to the Class B stock. This amount represents the sum received by Senior Investment Corporation upon the redemption of a portion of the Fisher & Company stock held by Senior Investment Corporation.

In the present Corporation, it is provided that after $400.00 per share has been paid to Class B stock, any then remaining value of the shares of stock in Fisher & Company held by the corporation should be distributed to the Class B and Class C stock in proportions of the credits for increase in value of Fisher & Company stock. Any balance to be distributed as any other balances are required to be distributed. Some provision should be made in the New Delaware Corporation Charter, except it should be worded that any remaining value of the shares of stock in Fisher & Company and or any remaining proceeds of Fisher & Company stock should be distributed to the Class B and C stock of the New Delaware Corporation in the said proportions. In present Corporation, it is provided that upon liquidation or dissolution, the Class C stock after payment in full to the holder of other classes of stock shall be entitled to the exclusion of the holders of all such other classes of stock to share ratably in all remaining assets of the corporation. The same provision should be carried over in the Articles of the New Delaware Corporation. In the amended Articles of the Old

Michigan Corporation, Class C stock should be entitled to all the remaining assets of the corporation after all payments required to be made to the Class A stock has been made.

The deficit shown by the books of the present Corporation as of June 30, 1933, for losses which have been actually sustained is $21,041,234.12. No dividends could be paid by the present Corporation until this deficit has been wiped out. It is stated in the Agreement and Plan of Reorganization and Recapitalization that it is the intention of the parties thereto to preserve the rights, powers and privileges of the classes of stock now outstanding. In order to do this provision must be made for the restoration of the said deficit as between the New Delaware Corporation and the Old Corporation before dividends may be paid on any class of stock of the New Delaware Corporation and the Old Michigan Corporation. To do this the deficit should be allocated as between the New Delaware Corporation and the Old Michigan Corporation on the same basis or percentages as hereinabove provided with reference to dividends, redemption and liquidation of the Class A stock of the New Delaware Corporation, namely .69373285 for the New Delaware Corporation and .30626715 for the Old Michigan Corporation or $14,596,994.26 for the New Delaware Corporation and $6,444,239.86 for the Old Michigan Corporation. The Charter of the New Delaware Corporation should provide that the earnings and profits of the Corporation shall be transferred to capital surplus until said deficit of $14,596,994.26 has been restored and no dividends may be paid on the Class A or Class B stock until said sum has been restored to capital surplus. The amended Charter of the Old Michigan Corporation should provide that the earnings and profits of the Corporation shall be transferred to capital until said deficit of $6,444,239.86 has been restored and no dividends may be paid on the Class A stock until said sum has been restored to capital.

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Joint Exhibit A-7

CERTIFICATE OF INCORPORATION OF SENIOR CORPORATION

1. The name of the Corporation is: Senior Corporation.

2. The principal office or place of business of the Corporation in the State of Delaware is to be located at No. 100 West 10th Street, in the City of Wilmington, County of New Castle. The name and address of its resident agent is The Corporation Trust Company, No. 100 West 10th Street, Wilmington, Delaware.

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3. The nature of the business of the corporation and the objects and purposes to be transacted, promoted or carried on by it are as follows:

To purchase, exchange, or otherwise acquire, underwrite, hold, sell and/or sell short, exchange, pledge, hypothecate or otherwise dispose of or deal in, the stocks, bonds, notes, debentures or other evidences of indebtedness, obligations of and/or interests in any private, public, quasi-public, or municipal corporation, domestic or foreign, or of any domestic or foreign state government or governmental authority, or of any political or administrative subdivision or department thereof, and all trust, participation or other certificates of, or receipts evidencing, interest in any such securities and obligations, and notes or other obligations of individuals, partnerships, associations and syndicates, and to pay for any such securities, evidences of indebtedness and obligations, in cash, or to issue in exchange therefor or in payment thereof its own stock, bonds, debentures or other obligations or securities or to make payment therefor by any other lawful means of payment whatever.

To do any and all acts and things for the preservation, protection, improvement and enhancement in value of any and all such securities or evidences of interest therein, and to aid by loan, subsidy, guaranty or otherwise those issuing, creating or responsible for any such securities or evidences of interest therein as aforesaid by original subscription, underwriting, loan, participation in syndicates, or otherwise, and irrespective of whether or not such securities or evidences of interest therein be fully paid or subject to further payments; and to make payment thereon as called for or in advance of calls or otherwise; and to underwrite or subscribe for the same, conditionally or otherwise, and either with a view to investment or for resale or for any other lawful purpose.

To enter into, make, perform and carry out, or cancel and rescind contracts of underwriting of the securities of any cor-
79 poration, association, partnership, firm, trustee, syndicate, individual, government, state, municipality, or other political or government division or subdivision, domestic or foreign, or of any combination, organization or entity, domestic or foreign, and to act as manager of any underwriting or purchasing or selling syndicate.

To lend money on call or time and with or without collateral or other security.

To buy, exchange or otherwise acquire, own, hold, deal in, sell and otherwise dispose of goods, wares and merchandise, and personal property of every character and description and all interests of any character therein.

To buy, exchange or in any way acquire, hold, own, possess, sell and in any way dispose of real property of every kind and description and all interests of every kind in real property.

To engage in any kind of manufacturing business or process and to carry on any business or process whereby raw materials or personal property of every kind are developed, transformed or improved into finished or more finished materials, products or property; and to buy, exchange, contract for, lease, construct and otherwise acquire, take, hold and own, and to sell, mortgage, lease or otherwise dispose of, plans for such manufacturing process and/or development; and to manage, operate, maintain and improve the same.

To search for, prospect and explore for all kinds of minerals and mineral deposits, and for oil and gas; to mine, mill, drill for, convert, prepare for market and otherwise produce and deal in minerals and mineral deposits, oil and gas and the products, by-products and residual products thereof; to purchase or in any manner acquire, to own, hold and operate, and to sell, lease, encumber or in any manner dispose of, minerals, mineral lands, oil or gas lands and mineral rights, and oil, gas or mineral rights of all kinds, and to construct, or in any manner acquire, to own and hold; and to sell, encumber, or in any manner dispose of, buildings, works, workshops, laboratories, machinery, power plants, pipe lines and other property necessary or convenient to that end, but not to operate as a public utility.

80 To buy, exchange or in any way acquire, take, hold, own, operate, sell and dispose of refineries, smelters, reduction plants and any and all other plants for the extraction of minerals from ores or valuable products from subterranean or surface liquids, together with all tanks, plants, works and appurtenances necessary, proper or convenient therefor.

To buy, exchange or in any way acquire, hold, own, and operate telegraph and telephone lines, transportation lines by land or water, and pipe lines, necessary, useful or convenient in the judgment of the officers of this company for its own business; and to improve, maintain and operate the same; and to sell, mortgage, lease or otherwise dispose of the same.

To engage in a general building and construction business; to construct houses, stores, office buildings, manufacturing plants, bridges, and buildings, foundations and structures of every class and description for others and/or to so construct and erect the same on properties held, owned, or possessed by the company for sale, lease, exchange or other disposition by the company.

To do engineering for businesses and industries of every kind and nature.

To engage in research, experimental and laboratory work in all the various branches of science.

To buy, exchange or otherwise acquire, hold, own, operate, sell and otherwise dispose of water rights and water supplies together

with all necessary or convenient pipe lines, reservoirs, dams, ditches and other appurtenances necessary or useful in the judgment of the officers of this company for its own business; and to manage, operate, maintain, improve, extend and develop the same.

To carry on a stock and bond brokers business in all its branches.

To transact a general real estate agency and brokerage business, including the management of estates; to act as agent, broker or attorney in fact for any persons, partnerships or corporations in buying, selling and dealing in real property and any and every estate and interest therein; to make or obtain loans upon
81 such property, and to supervise, manage and protect such property and all loans and all interests in and claims affecting the same.

To act as brokers, agents and adjusters in the business of any kind or class of insurance in any or all of its branches.

To do a general commission merchants and selling agents business; and to act as broker, agent, factor, and representative for and in every character and line of business.

To apply for, obtain, register, purchase or otherwise acquire, and to own, operate, introduce and to sell, assign or otherwise dispose of, any trade marks, trade names, patents, inventions, or any interest in the same, or any improvements, processes and discoveries used in connection with or secured under letters patent of the United States or of any sovereignty, governmental body or power whatsoever and wheresoever situate; and to use, develop, and grant licenses in respect of or otherwise employ for profit any such trade marks, patents, licenses, processes, discoveries, and the like, or any such properties or rights.

To purchase or otherwise acquire, equip, maintain and operate timber and lumber yards; to purchase, prepare for market, buy, sell, import, export, market and otherwise trade and deal in logs, timber and lumber, rough and dressed, and the products thereof.

To purchase, sell and deal in timber lands, cut-over lands and real estate; to lease, purchase or otherwise acquire, to own and hold, and to sell, lease, encumber or in any manner dispose of and to deal in timber lands, timber and logging rights and logging and turpentining privileges; and to extract, distill and refine turpentine, resin and other forest products, and to sell or otherwise dispose of the same; to cut and remove timber, and to manufacture and sell wood pulp, wood solvents, wood fiber and wood products and by-products, and paper, paper boards, paper substitutes, boxes, containers, turpentine, stock-food, resin, naval stores and other articles made wholly or in part of wood or wood products; and to construct or in any manner acquire, to own and operate, and to sell, lease, encumber or otherwise dispose of, works, mills,

plants, factories, warehouses, machinery, tramways, logging roads and other facilities necessary or convenient to that end.

To make contracts for and to open, keep, audit, examine or certify to the correctness of books and accounts of individuals, partnerships and corporations; and to do a general auditing and accounting business so far as may be permitted by law.

To manage, counsel in respect of and direct the affairs of any business, or commercial or manufacturing undertaking of individuals, associations or corporations, and to carry on in an advisory and consultive capacity a general business in engineering, accounting, appraisement and related branches.

To purchase, exchange or otherwise acquire, operate and manage ranches, farms and farm lands, and in connection therewith the doing of a general sheep, cattle and livestock-raising business; and to farm the said lands and to raise agricultural products thereon; and to raise and sell cattle and livestock of all kinds.

To make, enter into and carry out any arrangements which may be deemed to be for the benefit of the corporation, with any corporation, association, partnership, firm, trustee, syndicate, individual, government, state, municipality or other political or governmental division or subdivision, domestic or foreign, or of any combination, organization or entity, domestic or foreign; to obtain therefrom or otherwise to acquire by purchase, lease, assignment or otherwise, any powers, rights, privileges, immunities, franchises, guarantees, grants and concessions; to hold, own, exercise, exploit, dispose of and realize upon the same and to undertake and prosecute any business dependent thereon; and to cause to be formed, to promote, and to aid in any way in the formation of any corporation, association or organization of any kind, domestic or foreign, for any such purpose.

To organize or cause to be organized under the laws of the State of Delaware or of any other state, district, territory, nation, colony, province or government, a corporation or corporations,

83 for the purpose of accomplishing any or all of the objects for which the corporation or corporations is or are organized; and to dissolve, wind up, liquidate, merge or consolidate any such corporation or corporations, or to cause the same to be dissolved, wound up, liquidated, merged or consolidated.

To exercise, all rights, powers and privileges whatsoever of ownership of all stocks, bonds and other evidences of indebtedness or interest owned or held by this company, including the right to vote thereon for any and all purposes.

To borrow or raise moneys for any of the purposes of the corporation and from time to time, without limit as to amount, to draw, make, accept, endorse, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures and other negotiable or non-negotiable instruments and evidences of indebtedness, and to secure the payment thereof and of the interest thereon by mortgage on, or pledge, conveyance or assignment in trust of, the whole or any part of the assets of the corporation, real, personal or mixed, including contract rights, whether at the time owned or thereafter acquired, and to sell, pledge or otherwise dispose of such securities or other obligations of the corporation for its corporate purposes; to confer, in any manner permitted by law, upon the holders of any bonds, debentures or obligations of the corporation secured or unsecured, the right to convert the principal thereof into stock of the corporation upon such terms and conditions as may be deemed advisable.

To make any guaranty respecting stocks, dividends, securities, indebtedness, interest, contracts or other obligations, so far as the same may be permitted to be done by a corporation organized under the laws of the State of Delaware.

To cause to be formed, merged or reorganized or liquidated, and to promote, take charge of and aid in any way permitted by law, the formation, merger, liquidation or reorganization of any corporation, association or organization of any kind, domestic or foreign; and to promote, take charge of and aid in any way permitted by law, the formation, merger, reorganization or
84 liquidation of, any corporation, association or entity in the United States or abroad.

To enter into, make, perform and carry out or cancel and rescind contracts of every kind for any lawful purposes pertaining to its business with any person, entity, syndicate, partnership, association, corporation or governmental, municipal or public authority, domestic or foreign.

To have one or more offices to carry on all or any of its operations and businesses in any of the states, districts, territories or colonies of the United States and in any and all foreign states or countries; and without restriction or limit as to amount to purchase or to otherwise acquire, hold, own, mortgage, sell, convey or otherwise dispose of real and personal property of every class and description in any of the same, subject to the laws of such state, district, territory, colony or country.

In general to carry on any business not contrary to the laws of the State of Delaware, and to have and exercise all of the powers conferred by the laws of said State upon corporations formed thereunder, and to do any and all of the things hereinbefore set forth to the same extent as natural persons might or could do, and

in any part of the world as principal agent or otherwise, and either alone or in company with others.

To carry on any business, work or thing whatsoever which the corporation may deem proper or convenient in connection with any of the foregoing purposes or otherwise, or which may be calculated, directly or indirectly, to promote the interests of the corporation or to enhance the value of its property.

The foregoing clauses shall be construed both as objects and powers; and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the general powers of this corporation, but are in furtherance of and in addition to, and not in limitation of, the general powers conferred by these articles and by the laws of the State of Delaware.

It is the intention that the purposes, objects, and powers
85 specified in this Article 3 and all subdivisions thereof, except as otherwise expressly provided, in nowise be limited or restricted by reference to or inference from the terms of any other clause or paragraph of this Article, and that each of the purposes, objects and powers specified in this Article shall be regarded as independent purposes, objects and powers, nor shall the expression of one thing be deemed to exclude another not expressed, although it be of like nature.

The corporation shall be authorized to exercise and enjoy all other powers, rights and privileges granted by the general corporation laws of the State of Delaware by Chapter 65 of the Revised Code of Delaware of 1915 to corporations of this character, and all the powers conferred upon such corporations by the laws as enforced from time to time of the State of Delaware so far as not in conflict herewith or which may be conferred by all Acts heretofore or hereafter amendatory of or supplemental to said general corporation laws or said laws, and the enumeration of certain powers as herein specified is not intended as exclusive of or as a waiver of any of the powers, rights or privileges granted or conferred by said general corporation law or said laws now or hereafter in force. Provided, However, that the corporation shall not in any State, District, Territory, Possession or Country carry on any business which a corporation organized under the laws of said State, District, Territory, Possession or Country could not carry on.

4. The total number of shares of all classes of stock which the Corporation shall have authority to issue is three hundred thousand (300,000), of which one hundred thousand (100,000) shares shall be Class A stock of the par value of Ten Dollars ($10.00) per share, one hundred thousand (100,000) shares shall be Class B stock of the par value of Ten Dollars ($10.00) per share, and

one hundred thousand. (100,000) shares shall be Class C stock, without par value.

The minimum amount of capital with which the Corporation will commence business is One Thousand Dollars ($1,000.00).

The statement of all the designations, powers, prefer-
86 ences, rights, qualifications, limitations or restrictions thereof in respect of the several classes of stock of the Corporation is as follows:

(a) The earnings and profits of the Corporation to the extent of $14,596,994.26 shall, from time to time, be transferred to capital or capital surplus or surplus and anything herein contained or otherwise to the contrary notwithstanding, no dividends, whether cumulated or current shall be paid or set aside on any shares of stock of the Corporation until earnings and profits of the Corporation in the total sum of $14,596,994.26 have been so transferred to capital or capital surplus, or surplus, and if transferred to capital surplus or surplus no dividends on any class of stock shall be paid out of any such capital surplus or surplus, nor shall any dividends be paid from any surplus representing the excess of the value of the assets and property received by this Corporation in exchange for the shares of stock issued by this Corporation pursuant to the plan of Reorganization and Recapitalization under which this Corporation was organized, over the amount declared by the Board of Directors to be capital.

(b) The shares of Class A stock shall be entitled to receive, except as herein otherwise provided, when and as declared by the Board of Directors out of the surplus or net profits of the Corporation arising from the assets and property of the Corporation other than from the shares of stock of Fisher & Company held by the Corporation, cumulative dividends at the rate of Sixteen and 65/100ths Dollars ($16.65) per share per annum, and no more, payable at least semi-annually on the 1st days of March and September of each year, and at such other times as the Board of Directors may from time to time determine. Such dividends may, in the discretion of the Board of Directors, be paid either in cash or—in whole or in part—in stocks or other securities, other than Fisher & Company stock at any time held by this Corporation, at the market value of such stock or securities at the time of such distribution.

(c) In the event of any liquidation or dissolution or
87 winding up—whether voluntary or otherwise—of the corporation, the Class A stock shall be entitled to receive in full out of the assets—whether capital or surplus—payable either in assets of the corporation other than cash or in cash or partly in cash and partly in such assets, the sum of Four Hundred Sixteen and 24/100ths Dollars ($416.24) per share, plus an amount equal

to Sixteen and 65/100ths Dollars ($16.65) per share per annum for the period from July 29, 1929, to August 31, 1933, representing the proportionate share of the cumulated and unpaid dividends on the Class A stock of Senior Investment Corporation, a Michigan corporation, in the reorganization of which this Corporation was organized, and plus an amount equal to all accrued but unpaid dividends thereon after August 31, 1933, before any payment shall be made to or on any of the remaining classes of stock of this Corporation, except as provided in paragraph (e) of this Article 4.

(d) Class A stock may be redeemed, in whole or in part, at any time or from time to time, at the option of the Board of Directors, at such price per share as may be agreed between the shareholder whose shares are to be redeemed and the Company; provided, however, that such agreed price shall in no event exceed Four Hundred Sixteen and 24/100ths Dollars ($416.24) per share and that such redemption and the price agreed to be paid shall in each instance be approved in writing by the holders of not less than eighty per cent (80%) of the Class A shares then outstanding; and there shall be added to such agreed redemption price the amount of all accrued and unpaid dividends as specified in the preceding paragraph on the shares to be redeemed. The agreement and approval for such optional redemption price may provide that such optional redemption price may be paid in assets of the Corporation (other than Fisher & Company stock) other than cash or in cash or partly in such assets and partly in cash. If less than all of the outstanding Class A stock is to be redeemed, the stock to be redeemed shall be selected in such manner as the Board of Directors may determine. In the event it shall be determined to pay for the redemption of any or all of the shares of the Class A stock at any time outstanding either entirely or partially in such assets of the Corporation other than cash, the assets so to be utilized and the credit to be received therefor on the redemption price shall be fixed by agreement between the company and the shareholder whose Class A shares are to be redeemed, subject at all times, however, to the approval in writing of the holders of not less than eighty per cent (80%) of the Class A shares then outstanding. Notice of the intention to redeem shall be given by mailing notice thereof, specifying the date and place of redemption—and if less than all, the certificates to be redeemed—to each holder of record of shares to be redeemed at the last address of such holder appearing on the stock registry of this corporation.

(e) The shares of Class B stock of this corporation shall be entitled to receive each year in dividends the total net income—as hereinafter defined—received by this Corporation from the stock of Fisher & Company, a Michigan corporation, at any time

held by this corporation, up to Twenty-four Dollars ($24.00) per share per annum. If said net income from said Fisher & Company stock shall in any year exceed Twenty-four Dollars ($24.00) per share per annum on the outstanding Class B stock and the amount of said Twenty-four Dollars ($24.00) per share per annum shall have been declared and paid or set aside for all outstanding Class B shares, a dividend up to One Dollar ($1.00) per share shall be paid therefrom to the Class C stock; any remaining net income from Fisher & Company stock shall be distributed equally, share for share, between Class B and Class C stock. Out of the capital surplus or surplus of this Corporation the sum of $1,675,000 in cash and/or in property shall be allocated to the Fisher & Company stock at any time held by this Corporation, said sum representing the proceeds received from the redemption of a portion of the shares of Fisher & Company stock held by Senior Investment Corporation, a Michigan corporation, in the reorganization of which this Corporation was organized. Whenever the words "Fisher & Company stock" or the words "shares of
89 stock of Fisher & Company" or any words of similar import are used herein, such words shall mean and include the shares of stock of Fisher & Company at any time held by the Corporation plus the said sum of $1,675,000 allocated to the Fisher & Company stock, plus the moneys and/or property, if any, received in exchange for or by virtue of any of the shares of Fisher & Company stock any time held by the Corporation. To determine the net income arising from said Fisher & Company stock, there shall be deducted from the gross amount of all dividends and income from Fisher & Company stock the amount of all taxes (including franchise or excise taxes) required to be paid by this Corporation on said Fisher & Company stock and on or in respect of the aliquot portion of the assets of this corporation represented by said stock, and all taxes on the income therefrom, plus the cost and expense of handling and managing said stock by this Corporation as determined by the Board of Directors of this corporation. If the net profits or surplus of this Corporation be not sufficient to pay the dividends provided in this paragraph (e), the dividends herein provided for shall be paid only to an amount equal to the existing surplus or net profits of this Corporation; any increase in value of Fisher & Company stock shall not be considered or included in determining the existing surplus or net profits of this Corporation for this purpose. Any surplus representing the excess of the value of the assets and property received by this Corporation in exchange for the shares of stock issued by this Corporation pursuant to the plan of Reorganization and Recapitalization, under which this Corporation was organized, over the amount declared by the Board of Directors to be

capital and any surplus or capital surplus created by the transfers made to surplus or capital surplus pursuant to the provisions of Paragraph (a) of this Article 4 shall not be considered or included in determining the existing surplus or net profits of this Corporation for this purpose.

(f) If and when the shares of Fisher & Company stock, held by this corporation, shall, as shown by the books of said
90 Fisher & Company, have a value of $38,325,000, then and thereafter, in addition to the dividends so to be paid on the Class B and Class C shares any increase in any year in the value of the shares of Fisher & Company stock then held by this Corporation as such increase shall be shown by the books of said Fisher & Company at the end of the fiscal year of said Fisher & Company ending in such year of this Corporation shall accrue in each year to said Class B and Class C stock of this Corporation in the proportions and in the amounts which the same would have accrued and been distributed to said Class B and Class C stock of this Corporation if the amount of said increase in such year had been received in cash by this Corporation as dividends on said shares of said Fisher & Company stock in addition to the amount of dividends on said Fisher & Company stock actually received by this Corporation in cash in such year and the next to the last sentence of paragraph (e) of this Article 4 were not operative beyond the amount of the dividends in fact received in cash from Fisher & Company. An account shall be kept on the books of this Corporation which shall take up all increases in value of Fisher & Company stock held by this Corporation as often as each such increase is shown by the books of said Fisher & Company as aforesaid. Said account shall at all times show the amount of such increase accrued to each of the classes of Class B and Class C stock and to each share of each of said classes then outstanding. If in any year there shall be a decrease in the value of the shares of Fisher & Company as shown on the books of Fisher & Company at the end of the fiscal year of Fisher & Company ending in such year of this Corporation, such decrease shall be taken up in said account on the books of this Corporation and the amount of such decrease deducted from the total net credit of the accruals of increases of Fisher & Company stock to that time shown in said account to the credit of the Class B and Class C stock respectively which deduction shall be made from each of said Class B and Class C in the proportion of the number of shares of each of said classes then outstanding, the shares of each
91 class to be considered and treated as a unit for this purpose.

The credits accrued pursuant to the foregoing provisions of this paragraph (f) shall not be required to be distributed in

dividends but shall be required to be distributed only pursuant to paragraph (g) of this Article 4.

(g) On any liquidation, dissolution, or winding up of the affairs of this Corporation—whether voluntary or involuntary—the class B stock shall be entitled to receive out of said Fisher & Company stock then held by this Corporation Four Hundred Dollars ($400.00) per share of said Class B stock plus the amount of any net income from said Fisher & Company stock, as net income is defined in paragraph (e) of this Article 4, which would have been distributable to said Class B stock if there had been no liquidation, dissolution, or winding up. Such Payment may be made either in cash or in shares of Fisher & Company stock or partly in cash and partly in such shares, said Fisher & Company stock for such purpose to be taken at the book value thereof as then shown on the books of Fisher & Company. The right of the Class B stock to so receive said Four Hundred Dollars ($400.00) and undistributed net income in the foregoing portion of this paragraph (g) described shall be free from and superior to the rights and claims of the holders of all other classes of stock of this Corporation. Any then remaining value of the shares of stock in Fisher & Company held by this Corporation shall be distributed to the Class B and Class C stock in the proportions and up to the amounts which the net increase in value of said Fisher & Company stock shall to that time have accrued to said Class B and Class C stock then outstanding under the provision of paragraph (f) of this Article 4, and any balance over the sum of the amounts so accrued shall be distributed as assets other than Fisher & Company stock are by this Certificate of Incorporation provided to be distributed.

Any net income as defined in paragraph (e) of this Article 4 which would have been distributable to the Class C stock if there had been no liquidation, dissolution, or winding up shall
92 be distributed to said Class C stock on said liquidation, dissolution, or winding up.

(h) Class B stock may be redeemed in whole or in part at any time or from time to time at the option of the Board of Directors at such price per share as may be agreed between the shareholder whose shares are to be redeemed and the company; provided, however, that such agreed price shall in no event exceed the amount which such shares would have been entitled to receive in distribution as aforesaid if this Corporation were to be liquidated, dissolved, or wound up at the time of such redemption, and that such redemption and the price agreed to be paid therefor shall in each instance be approved in writing by the holders of not less than eighty percent (80%) of the Class B shares then outstanding; and there shall be added to such agreed redemption price the amount of all unpaid dividends as hereinbefore specified on the shares to

be redeemed. The agreement and approval for such optional redemption price may provide that such optional redemption price may be paid in cash or in assets of the Corporation (including stock of Fisher & Company then held by the Corporation) other than cash or partly in such assets and partly in cash. If less than all of the outstanding Class B stock is to be redeemed, the stock to be redeemed shall be selected in such manner as the Board of Directors may determine. In the event it should be determined to pay for the redemption of any or all of the shares of the Class B stock at any time outstanding either entirely or partially in such assets of the Corporation other than cash, the assets so to be utilized and the credit to be received therefor on the redemption price shall be fixed by agreement between the company and the shareholders whose Class B shares are to be redeemed, subject at all times, however, to the approval in writing of the holders of not less than eighty percent (80%) of the Class B shares then outstanding. Notice of the intention to redeem shall be given by mailing notice thereof, specifying the date and place of redemption—and if less than all, the certificates to be redeemed—to each holder of record of shares to be redeemed at the last
93 address of such holder appearing on the stock registry of this Corporation.

(i) On any redemption of any of the Class A or Class B stock of this Corporation, the Corporation may deposit the aggregate redemption price or the assets of this Corporation other than cash to be utilized in such redemption, with any bank or trust company, either in the City of Detroit or City of New York, named in such notice, payable or deliverable as aforesaid to the respective record holders of the shares to be redeemed, on endorsement and surrender of their certificates in this Corporation; and thereupon said holders shall cease to be stockholders with respect to such shares, and from and after the making of such deposit said holders shall have no interest in or claim against the Corporation with respect to such shares but shall be entitled only to receive said moneys or assets other than cash from said bank or trust company without interest. Any moneys or assets other than cash unclaimed at the end of six years from the date of the said deposit shall be paid or redelivered to the Corporation. No stock so redeemed shall ever be reissued by the Corporation.

(j) In addition to any dividends payable on the Class C stock out of the income of Fisher & Company stock as hereinbefore provided, dividends may be declared upon the Class C stock of this Corporation out of any surplus or net profits of the corporation—except such as may arise out of or result from any income of the stock of Fisher & Company held by this Corporation as provided in Paragraph (e) of this Article 4—remaining after full cumula-

tive dividends on the Class A stock for all previous dividend periods shall have been paid and for the current semi-annual period shall have been declared and paid or set aside.

(k) If and after the Class B stock hereunder shall have been redeemed, the amount of the net income from said Fisher & Company stock, as hereinbefore defined, shall be available for the payment of dividends on said Class C stock if, when, and as declared by
94 the Board of Directors, but not to an amount which shall exceed the net profits or surplus of this Corporation.

(l) In the event of any liquidation, dissolution or winding up of the Corporation, the Class C stock, after payment in full to the holders of the other classes of stock on such liquidation, dissolution or winding up, as hereinbefore provided, shall be entitled, to the exclusion of the holders of all other classes of stock hereunder, to share ratably in all remaining assets of the Corporation.

(m) Except as otherwise expressly provided by the laws of the State of Delaware Class A and Class B stock shall have no voting power nor shall the holders thereof as such be entitled to notice of stockholders' meetings, all rights to vote and all voting power being hereby vested exclusively in the holders of Class C stock.

5. Special statements pertaining to the primary organization of this Corporation and not included in the foregoing requirements:

(a) None of the stock of Fisher & Company of any kind or class at any time held by this Corporation shall be sold, mortgaged or pledged, or contract for any of the same be made, or any interest in any of the same be created in any person, firm or corporation without the consent in writing of at least two-thirds of the outstanding Class B stock of this Corporation.

(b) Except as hereinafter provided in this paragraph, no holder of any stock of this corporation shall be entitled as of right to purchase or subscribe for any part of any unissued stock of this corporation, or any new or additional stock of any class to be issued by reason of any increase in the authorized capital stock of this corporation, or of any issue of securities of the corporation convertible into stock, whether such stock or securities be issued for money or for a consideration other than money. When any such unissued stock or any such additional authorized issue of new stock
95 or such securities convertible into stock are to be issued and disposed of, it may be issued and disposed of by the Board of Directors to such persons, firms, corporations or associations and upon such terms as the Board of Directors may in their discretion determine without offering to the stockholders then of record or any class of stockholders any thereof on the same terms or any terms; provided, however, that no Class C stock shall be issued or sold except after having first been offered for subscription to the

holders of the then outstanding Class C stock according to their respective shares.

(c) In the absence of fraud no contract or other transaction with any other corporation or any individual, association, or firm, shall be in any way affected or invalidated by the fact that any of the directors of the corporation are interested in such other corporation, association or firm, or personally interested in such contract or transaction, nor shall any director so interested be liable to account to the corporation for any profit made by him from or through any such contract or arrangement so adopted by the Board of Directors or which may be ratified and approved by the holders of the Class C stock, by reason of such director holding such office or the fiduciary relationship thereby established. Any director of this corporation may vote upon any contract or other transactions between this corporation and any subsidiary or affiliated corporation without regard to the fact that he is also a director of such subsidiary or affiliated corporation.

(d) Any contract, transaction or act of the corporation or of the Board of Directors, which shall be ratified by a majority of a quorum of the voting stock at any annual meeting or at any special meeting called for such purpose shall be as valid and binding as though ratified by every stockholder of the corporation; provided, however, that any failure of the voting stockholders to approve or ratify such contract, transaction or act, when and
96 if submitted, shall not be deemed in any way to render the same invalid nor to deprive the directors or officers of their right to proceed with such contract, transaction, or act.

(e) The Directors may from any funds available after all dividend payments on the Class A and Class B stocks have been made or set aside for the current semi-annual period, devote so much of the remaining available funds of the company—other than any net income arising from Fisher & Company stock held by this corporation—to one or more religious, charitable, scientific, literary, or educational purposes, and to this end may make payment of all or any part of such funds to such corporation, trust, community chest, fund, foundation, post, or organization of war veterans, institution, church, school, association, or person, or any number of the foregoing, as in the sole discretion of the Board of Directors is best qualified to carry out the purposes at the time sought to be fulfilled or accomplished. The matters stated in this paragraph (e) of Article 5 shall be construed as objects, and purposes of this corporation as well as stating the powers of the Board of Directors with respect to such objects and purposes.

(f) Authority is hereby specifically conferred upon the Board of Directors of the corporation at any time and from time to time, to mortgage, pledge, or hypothecate the property of the cor-

poration, in whole or in part—subject to the limitations respecting Fisher & Company stock, set forth in paragraph (a) of Article 5 hereof—for the purpose of securing any obligation of the corporation that may from time to time be created and incurred.

6. The names and places of residence of each of the incorporators are as follows:

Names	*Places of residence*
C. S. Peabbles	Wilmington, Delaware.
Alfred Jervis	Wilmington, Delaware.
Walter Renz	Wilmington, Delaware.

97 7. The corporation is to have perpetual existence.

8. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

9. All corporate powers of the Corporation shall be exercised by the Board of Directors except as otherwise provided by law. The Board of Directors may, by resolution or resolutions, passed by a majority of the whole Board, designate one or more committees, each committee to consist of two or more of the directors of the Corporation, which, to the extent provided in said r'solution or resolutions or in the by-laws of the Corporation, shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the Corporation, and may have power to authorize the seal of the Corporation to be affixed to all papers which may require it.

The number of directors which shall constitute the whole Board shall be fixed from time to time by the by-laws and may be altered from time to time by amendment of the by-laws, but in no case shall the number be less than three. In case of any increase in the number of directors, the additional directors shall be elected as provided in the by-laws.

The directors may hold their meetings and have an office or offices outside the State of Delaware if the by-laws so provide.

Directors need not be stockholders of the Corporation or residents of the State of Delaware.

Subject to the power of the stockholders of the Corporation to make, alter, or repeal by-laws, there is hereby conferred upon the Board of Directors the power to make, alter, amend, and repeal by-laws of the Corporation.

The Board of Directors may from time to time establish, reestablish, amend, alter or repeal and may put into effect and carry out such a plan or plans as may from time to time be approved by it for the distribution among or sale to the officers and employees of the Corporation, or any of them, in addition to their
98 regular salaries or wages, of any moneys or other property of the Corporation, or of any shares of stock of the Corporation, of any class, in consideration for or in recognition of the services rendered by such officers and employees.

The Board of Directors may, by the affirmative vote of two-thirds of the members of the whole Board, remove at any time any officer elected or appointed by the Board of Directors, and may remove any other officer or employee of the Corporation or confer such power on any committee or officer. Any removal may be for cause or without cause.

The Board of Directors from time to time shall determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the Corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account, book, or document of the Corporation except as conferred by the laws of the State of Delaware or as authorized by resolution of the Board of Directors or the stockholders.

10. The stockholders may hold their meetings, annual or special, within or without the State of Delaware as may be provided in the by-laws. The Corporation may have one or more offices and keep any of the books of the Corporation, subject to the provisions of the laws of the State of Delaware, within or without the State of Delaware at such place or places as may from time to time be designated by the Board of Directors.

11. The Corporation reserves the right to amend, alter, change, or repeal any provision contained in this certificate in the manner now or hereafter prescribed by statute and all rights conferred upon the stockholders herein are granted subject to this reservation.

We, the undersigned, being each of the incorporators hereinbefore named for the purpose of forming a corporation to do business both within and without the State of Delaware, and in pursuance of the General Corporation Law of the State of Delaware, being Chapter 65 of the Revised Code of Delaware, and the 99 acts amendatory thereof and supplemental thereto, do make this certificate, hereby declaring and certifying that the facts herein stated are true, and accordingly have hereunto set our hands and seals this 26th day of August, A. D. 1933.

[L. S.] C. S. PEABBLES.
[L. S.] ALFRED JERVIS.
[L. S.] WALTER LENZ.

In the Presence of:
HAROLD E. GRANTLAND

STATE OF DELAWARE,
County of New Castle, ss:

Be it remembered, that on this 26th day of August, A. D. 1933, personally came before me, Harold E. Grantland, a Notary Public

for the State of Delaware, C. S. Peabbles, Alfred Jervis and Walter Lenz, all of the parties to the foregoing certificate of incorporation, known to me personally to be such, and severally acknowledged the said certificate to be the act and deed of the signers respectively and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

[SEAL] HAROLD E. GRANTLAND, *Notary Public.*

Harold E. Grantland, Notary Public. Appointed Jan. 11, 1933, State of Delaware. Term Two Years.

STATE OF DELAWARE

OFFICE OF SECRETARY OF STATE

I, Charles H. Grantland, Secretary of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Incorporation of the "Senior Cor-
100 poration", as received and filed in this office the twenty-sixth day of August, A. D. 1933, at 9 o'clock A. M.

In testimony whereof, I have hereunto set my hand and official seal, at Dover, this twenty-sixth day of August in the year of our Lord one thousand nine hundred and thirty-three.

[SEAL] CHARLES H. GRANTLAND,
Secretary of State.

Joint Exhibit A-8

UNITED STATES OF AMERICA

(State Seal)

THE STATE OF MICHIGAN

MICHIGAN CORPORATION AND SECURITIES COMMISSION

To all to whom these presents shall come:

I, Howard M. Warner, Commissioner of the Michigan Corporation and Securities Commission, Do Hereby Certify That the Annexed Copy of amendment to the articles of incorporation of the Senior Investment Corporation, filed in this office under date of August 29, 1933, has been compared by me with the record on file in this Department and that the same is a true copy thereof, and the whole of such record.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Commission, in the City of Lansing, this 10th day of September, A. D. 1941.

[SEAL]

HOWARD M. WARNER,
Commissioner.

101 CERTIFICATE OF AMENDMENT TO THE ARTICLES OF INCORPORATION

Decreasing capital stock and otherwise amending articles of Incorporation of the Senior Investment Corporation, P. O. Address 2402 Fisher Building, Detroit, Michigan

We, the undersigned, being the President and Secretary of the Senior Investment Corporation, a corporation existing under the provisions of Act No. 327 of the Public Acts of Michigan of 1931, do hereby certify as required by said Act:

That at a meeting of the Stockholders of said Corporation duly called for the express purpose of reducing the capital stock and otherwise amending the Articles of Incorporation thereof, as heretofore amended, in the particulars hereinafter set forth and duly held on the 28th day of August, A. D. 1933, the following resolutions and amendments were approved and adopted by the affirmative vote of the holders of all of the shares entitled to vote and by the affirmative vote of the holders of all of the shares of each class of stock whose rights, privileges, and preferences are changed thereby, to wit:

Resolved, that the capital stock of this Corporation be decreased from 300,000 shares without any par or nominal value, consisting of the following classes of stock without par value: Class A, 100,000 shares; Class B, 100,000 shares; Class C, 100,000 shares; to 100,000 shares of the par value of $5.00 per share to be designated as Class A stock, and 100,000 shares of the par value of $1.00 per share to be designated as Class C stock.

And be it further resolved, that in order to carry out the foregoing resolution the Articles of Incorporation as heretofore amended be further amended by striking out Article V and IX thereof and inserting in lieu thereof Articles V and IX which shall read as follows:

102

ARTICLE V

(1) The total capital stock authorized is two hundred thousand (200,000) shares, consisting of the following classes of stock:

Class A stock—one hundred thousand (100,000) shares, par value Five Dollars ($5.00) per share.

Class C stock—one hundred thousand (100,000) shares, par value One Dollar ($1.00) per share.

(2) The holders of Class A stock shall not be entitled to vote for Directors nor upon any other matter, except as provided by law, but the sole and exclusive voting power, except as provided by law, shall belong to and be vested in the holders of Class C stock.

(3) *Transfers to capital.*—The earnings and profits of the corporation to the extent of $6,444,239.96 shall from time to time be transferred to capital or capital surplus or surplus, and anything herein contained or otherwise to the contrary notwithstanding, no dividends, whether cumulated or current, shall be paid or set aside on any shares of stock of the corporation until earnings and profits of the corporation in the sum of $6,444,239.96 have been so transferred to capital or capital surplus or surplus.

(4) *Class A stock.*—The shares of Class A stock shall be entitled to receive, except as herein otherwise provided, when and as declared by the Board of Directors, out of the surplus or net profits of the Corporation, cumulative dividends at the rate of Seven and 35/100th Dollars ($7.35) per share per annum, and no more, payable at least semi-annually on the 1st days of March and September of each year, and at such other times as the Board of Directors may from time to time determine. Such dividends may, in the discretion of the Board of Directors, be paid either in cash or—in whole or in part—in stocks or other securities, at the market value of such stock or securities at the time of such distribution.

103 In the event of any liquidation or dissolution or winding up—whether voluntary or otherwise—of the corporation, the Class A stock shall be entitled to receive in full out of the assets—whether capital or surplus—payable either in assets of the corporation other than cash or in cash or partly in cash and partly in such assets, the sum of One Hundred Eighty-three and 76/100ths Dollars ($183.76) per share, plus an amount equal to Seven and 35/100ths Dollars ($7.35) per share per annum for the period from July 29, 1929, to August 31, 1933, and plus an amount equal to all accrued but unpaid dividends thereon after August 31, 1933, before any payment shall be made to or on any of the shares of stock of this Corporation.

Class A stock may be redeemed, in whole or in part, at any time or from time to time, at the option of the Board of Directors, at such price per share as may be agreed between the shareholder whose shares are to be redeemed and the Company; provided, however, that such agreed price shall in no event exceed One Hundred Eighty-three and 76/100ths Dollars ($183.76) per share and that such redemption and the price agreed to be paid shall in each instance be approved in writing by the holders of not less than

eighty percent (80%) of the Class A shares then outstanding; and there shall be added to such agreed redemption price the unpaid portion of the following amounts on the shares to be redeemed:

(a) $7.35 per share per annum for the period from July 29, 1929, to August 31, 1933; and

(b) An amount equal to all accrued and unpaid dividends thereon after August 31, 1933.

The agreement and approval for such optional redemption price may provide that such optional redemption price may be paid in assets of the Corporation other than cash or in cash or partly in such assets and partly in cash. If less than all of the outstanding Class A stock is to be redeemed, the stock to be redeemed shall be selected in such manner as the Board of Directors may determine. In the event it shall be determined to pay for the redemption of any or all of the shares of the Class A stock
104 at any time outstanding either entirely or partially in such assets of the Corporation other than cash, the assets so to be utilized and the credit to be received therefor on the redemption price shall be fixed by agreement between the company and the shareholder whose Class A shares are to be redeemed, subject at all times, however, to the approval in writing of the holders of not less than eighty percent (80%) of the Class A shares then outstanding. Notice of the intention to redeem shall be given by mailing notice thereof, specifying the date and place of redemption—and if less than all, the certificates to be redeemed—to each holder of record of shares to be redeemed at the last address of such holder appearing on the stock registry of this corporation.

On any redemption of any of the Class A stock of this Corporation the Corporation may deposit the aggregate redemption price and/or the assets of this Corporation other than cash to be utilized in such redemption, with any bank or trust company, either in the City of Detroit or City of New York, named in such notice, payable or deliverable as aforesaid to the respective record holders of the shares to be redeemed, on endorsement and surrender of their certificates in this Corporation; and thereupon said holders shall cease to be stockholders with respect to such shares, and from and after the making of such deposit said holders shall have no interest in or claim against the Corporation with respect to such shares but shall be entitled only to receive said moneys or assets other than cash from said bank or trust company without interest. Any moneys or assets other than cash unclaimed at the end of six years from the date of the said deposit shall be paid or redelivered to the Corporation. No stock so redeemed shall ever be reissued by the corporation.

(5) *Class C stock.*—Subject to the foregoing provisions of this Article V hereof and after an amount equal to the cumulated and unpaid dividends on said Class A stock for the period from July 29, 1929, to August 31, 1933, at the rate of Seven and 35/100ths Dollars ($7.35) per share per annum and plus an amount equal to all cumulated and unpaid dividends on said Class A stock for the period from and after August 31, 1933, and the dividends for the current semiannual period shall have been declared and paid, the Board of Directors may at any time and from time to time declare dividends upon the Class C stock of the Corporation.

In the event of liquidation, dissolution or winding up of the Corporation, the Class C stock after payment in full to the holders of the Class A stock of the amounts herein required to be paid to them, shall be exclusively entitled to share ratably in all the remaining assets and property of the Corporation.

(6) The total amount of stock outstanding is 171,573 shares, consisting of 71,573 shares of Class A stock of the par value of Five Dollars ($5.00) per share, and 100,000 shares of Class C stock of the par value of One Dollar ($1.00) per share. The 100,000 shares of Class B stock authorized by the original articles of association and issued pursuant thereto have been surrendered to the corporation by the holders thereof for cancellation.

(7) The capital of the corporation shall consist of an amount equal to the aggregate par value of all the shares thereof having par value, and the excess, if any, at any given time of the total net assets of the corporation over the amounts so determined to be capital shall be surplus, all or any part of which surplus the Board of Directors (subject to the limitations contained in the Articles of Incorporation as amended) in its discretion may apply to the reduction of the book value of the fixed assets or the good will or other capital assets of the corporation, or on account of capital losses, or use as otherwise permitted by law.

ARTICLE IX

Special statements pertaining to the primary organization of this corporation and not included in the foregoing requirements:

(a) Except as hereinafter provided in this paragraph, no holder of any stock of this corporation shall be entitled as of right to purchase or subscribe for any part of any unissued stock of this corporation, or any new or additional stock of any class to be issued by reason of any increase in the authorized capital stock of this corporation, or of any issue of securities of the corporation convertible into stock, whether such stock or securities be issued for money or for a consideration other

than money. When any such unissued stock or any such additional authorized issue of new stock or such securities convertible into stock are to be issued and disposed of, it may be issued and disposed of by the Board of Directors to such persons, firms, corporations or associations and upon such terms as the Board of Directors may in their discretion determine without offering to the stockholders then of record of any class of stockholders any thereof on the same terms or any terms: provided, however, that no Class C stock shall be issued or sold except after having first been offered for subscription to the holders of the then outstanding Class C stock according to their respective shares.

(b) In the absence of fraud no contract or other transaction, with any other corporation or any individual, association or firm, shall be in any way affected or invalidated by the fact that any of the directors of the corporation are interested in such other corporation, association or firm, or personally interested in such contract or transaction, nor shall any director so interested be liable to account to the corporation for any profit made by him from or through any such contract or arrangement so adopted by the Board of Directors or which may be ratified and approved by the holders of the Class C stock, by reason of such director holding such office or the fiduciary relationship thereby established. Any director of this corporation may vote upon any contract or other transaction between this corporation and any subsidiary or affiliated corporation without regard to the fact that he is also a director of such subsidiary or affiliated corporation.

(c) Any contract, transaction or act of the corporation or of the Board of Directors, which shall be ratified by a
107 majority of a quorum of the voting stock at any annual meeting or at any special meeting called for such purpose shall be as valid and binding as though ratified by every stockholder of the corporation; provided, however, that any failure of the voting stockholders to approve or ratify such contract, transaction or act, when and if submitted, shall not be deemed in any way to render the same invalid nor to deprive the directors or officers of their right to proceed with such contract, transaction or act.

(d) The Board of Directors may from any funds available, after all dividend payments on the Class A stock have been made or set aside for the current semiannual period, devote so much of the remaining available funds of the corporation to one or more religious, charitable, scientific, literary, or educational purposes, and to the end may make payment of all or any part of such funds to such Corporation, trust, community chest, fund, foundation, post or organization of war veterans, institutions, church, school association, or person, or any member of the foregoing as in the

sole discretion of the Board of Directors is best qualified to carry out the purposes at the time sought to be fulfilled or accomplished. The matters stated in this paragraph (d) of Article IX shall be construed as objects and purposes of this Corporation, as well as stating the powers of the Board of Directors with respect to such objects and purposes.

(e) Authority is hereby specifically conferred upon the Board of Directors of the Corporation at any time and from time to time, to mortgage, pledge or hypothecate the property of the Corporation, in whole or in part, for the purpose of securing any obligation of the Corporation that may from time to time be created or incurred.

In witness whereof, said Corporation, by its President and Secretary, has hereunto signed its name this 28th day of August, 1933.

SENIOR INVESTMENT CORPORATION,
By FRED J. FISHER,
Its President.
By HORACE S. MAYNARD,
Its Secretary.

108 STATE OF MICHIGAN,
County of Wayne, ss:

On this 28th day of August, 1933, before me, a Notary Public in and for said County, appeared Fred J. Fisher, President of the Senior Investment Corporation, known to me to be the person named in, and who executed the foregoing instrument, and acknowledged that he executed the same freely and for the intents and purposes therein mentioned.

[SEAL] JOHN C. MOONS, *Notary Public,*
Wayne County, Michigan.

My commission expires November 14, 1936.

Joint Exhibit A-9

SENIOR INVESTMENT CORPORATION

WAIVER OF NOTICE OF SPECIAL MEETING OF THE BOARD OF DIRECTORS

We, the undersigned, constituting all of the Board of Directors of Senior Investment Corporation, a Michigan corporation, do hereby severally waive any and all notice of a special meeting of the directors of said corporation, and we do hereby consent and agree that a special meeting of the board of directors of said corporation may and shall be held at the office of the Company, 2400

Fisher Building, in the City of Detroit, Michigan, on the 24th day of August, A. D. 1933, at two o'clock in the afternoon.

Dated August 24, 1933.

F. J. FISHER,
ROBERT C. SHIELDS,
HORACE S. MAYNARD,
ANDREW E. BALDWIN,
LEO BUTZEL.

109 SENIOR INVESTMENT CORPORATION

MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS

A Special Meeting of the Board of Directors of Senior Investment Corporation was held at the office of the Company, 2400 Fisher Building, in the City of Detroit, Michigan, on August 24, 1933, at two o'clock in the afternoon, pursuant to a written waiver of notice of such meeting signed by all of the Directors fixing the time and place of said meeting.

The following Directors were present in person:

Fred J. Fisher.
Robert C. Shields.
Horace S. Maynard.
Andrew E. Baldwin.

Mr. Fred J. Fisher, the President, presided and Mr. Horace S. Maynard acted as Secretary of the meeting.

The President stated that the officers of the corporation deemed it for the best interests of this corporation and its stockholders, that this corporation be reorganized and recapitalized. That subject to the approval of the Board of Directors and stockholders of this corporation, the President and Secretary, in the name and on behalf of the corporation, had executed an agreement and plan of reorganization and recapitalization of Senior Investment Corporation, the other parties to said agreement and plan being Senior Corporation, therein described as a corporation to be organized under the laws of the State of Delaware, and Fred J. Fisher, Burtha M. Fisher, and Andrew E. Baldwin, being the owners of all of the outstanding capital stock of this corporation. The President thereupon presented and read to the meeting a copy of the agreement and plan of reorganization and recapitalization of Senior Investment Corporation as executed. Thereupon and pursuant to a motion duly made and seconded and by the affirmative vote of all of the directors present at the meeting carried, the

110 copy of said agreement and plan as presented and read was ordered to be initiated by the Secretary and to be inserted

in the minute book of the corporation immediately following the minutes of this meeting.

Thereupon on motion duly made and seconded and by the affirmative vote of all the directors present, the following resolutions were adopted:

Resolved, that the agreement and plan of reorganization and recapitalization of Senior Investment Corporation as presented to this meeting be and the same is hereby ratified and adopted.

Further resolved, that the action of the President and Secretary of this corporation in executing the said agreement and plan of reorganization and recapitalization in the name and on behalf of this corporation be and the same is hereby ratified, approved and confirmed, and that this corporation be, and does hereby become, a party to said agreement and plan of reorganization and recapitalization.

Further resolved, that the proper officers of this corporation be and they hereby are authorized and directed to cause a corporation to be organized under the name of Senior Corporation, under the laws of the State of Delaware, with an authorized capital stock of Three Hundred Thousand (300,000 shares, consisting of One Hundred Thousand (100,000) shares of Class A stock of the par value of Ten Dollars ($10.00) per share, One Hundred Thousand (100,000) shares of Class B stock of the par value of Ten Dollars ($10.00) per share, and One Hundred Thousand (100,000) shares of Class C stock without par value.

Further resolved, that upon the organization of said Senior Corporation the proper officers of this corporation be and they hereby are authorized and directed to assign, transfer, set-over and deliver to said Senior Corporation by a proper instrument of assignment and transfer the assets and property specified in Annex A to said agreement and plan of reorganization and recapitalization in exchange for Seventy-One Thousand
111 Five Hundred Seventy-Three (71,573) shares of said Class A stock, One Hundred Thousand (100,000) shares of Class B stock and One Hundred Thousand (100,000) shares of Class C stock of said Senior Corporation, to be issued to the stockholders of this corporation at the rate of one (1) share of Class A stock, Class B stock and Class C stock of said Senior Corporation for each share respectively of Class A stock, Class B stock and Class C stock held by the stockholders of this corporation.

Further resolved, that the proper officers of this corporation be and they hereby are authorized to make or consent to any amendments of, or additions to, said plan or reorganization and recapitalization by said officers deemed necessary or advisable to fully carry out the intents and purposes of said plan of reorganization and recapitalization.

Further resolved, that the proper officers of this corporation be and they hereby are authorized to do all things and to execute all papers and documents by the said officers deemed necessary or advisable to consummate or put into full force and effect said plan of reorganization and recapitalization and any amendments thereof or additions thereto.

There being no further business to come before the meeting, on motion the same adjourned.

HORACE S. MAYNARD, *Secretary.*

Approved:

FRED J. FISHER, *President.*

We, the undersigned, being Directors of Senior Investment Corporation do hereby certify that we were present at a special meeting of the Board of Directors of said corporation held on the 24th day of August, A. D. 1933, and took part therein, and hereby waive any and all notice of said meeting; that the above and foregoing minutes are a true and correct record and statement of the action taken at said meeting and the resolutions adopted thereat, and we do hereby ratify, approve and confirm all action taken at said meeting and the resolutions adopted thereat, all as set out in the foregoing minutes of the meeting of the Board of Directors.

F. J. FISHER.
ROBERT C. SHIELDS.
HORACE S. MAYNARD.
ANDREW E. BALDWIN.
LEO BUTZEL.

Joint Exhibit A–10

SENIOR INVESTMENT CORPORATION

WAIVER OF NOTICE OF SPECIAL MEETING OF STOCKHOLDERS

We, the undersigned, being all the stockholders of Senior Investment Corporation, a Michigan corporation, do hereby severally waive any and all notice of a special meeting of the stockholders of said corporation, and we do hereby consent and agree that a special meeting of the stockholders of said corporation may and shall be held at the office of the company, 2400 Fisher Building, in the City of Detroit, Michigan, on the 24th day of August, A. D. 1933, at three o'clock in the afternoon.

Dated: August 24, 1933.

F. J. FISHER.
BERTHA M. FISHER.
ANDREW E. BALDWIN.

Senior Investment Corporation

MINUTES OF A SPECIAL MEETING OF THE STOCKHOLDERS

A Special Meeting of the Stockholders of Senior Investment Corporation was held at the office of the company,
113 2400 Fisher Building, in the City of Detroit, Michigan, on August 24, 1933, at three o'clock in the afternoon, pursuant to a written waiver of notice of such meeting signed by all of the Stockholders fixing the time and place of said meeting.

The following stockholders were present in person:

Fred J. Fisher,
Andrew E. Baldwin,
Burtha M. Fischer,

being the owners and holders of all of the shares of stock of each class of stock of this corporation outstanding.

Mr. Fred J. Fisher, the President, presided and Mr. Horace S. Maynard acted as Secretary of the meeting.

The President stated that the officers and Board of Directors of this corporation deemed it for the best interests of this corporation and its stockholders that this corporation be reorganized and recapitalized; that at a meeting of the Board of Directors held on this date an agreement and plan of reorganization and recapitalization of Senior Investment Corporation was presented and adopted. A copy of said agreement and plan of reorganization and recapitalization in the form as presented to the meeting of the Board of Directors was thereupon presented and read to this meeting of the stockholders. Thereupon the following resolutions were moved, seconded and unanimously carried by the affirmative vote of the holders of all of the shares entitled to vote, and by the affirmative vote of all of the shares of each class whose rights, privileges and preferences are changed thereby:

Resolved, that the agreement and plan of reorganization and recapitalization of Senior Investment Corporation as presented to this meeting be and the same is hereby ratified and adopted.

Further resolved, that the action of the President and Secretary of this corporation in executing the said agreement and plan of reorganization and recapitalization in the name and on
114 behalf of this corporation be and the same is hereby ratified, approved and confirmed, and that this corporation, be, and does hereby become, a party to said agreement and plan of reorganization and recapitalization.

Further resolved, that the proper officers of this corporation be and they hereby are authorized and directed to cause a corporation to be organized under the name of Senior Corporation, under the laws of the State of Delaware, with an authorized capital stock of Three Hundred Thousand (300,000) shares, consist-

ing of One Hundred Thousand (100,000) shares of Class A stock of the par value of Ten Dollars ($10.00) per share, One Hundred Thousand (100,000) shares of Class B stock of the par value of Ten Dollars ($10.00) per share, and One Hundred Thousand (100,000) shares of Class C stock without par value.

Further resolved, that upon the organization of said Senior Corporation the proper officers of this corporation be and they hereby are authorized and directed to assign, transfer, set-over, and deliver to said Senior Corporation by a proper instrument of assignment and transfer the assets and property specified in Annex A to said agreement and plan of reorganization and recapitalization in exchange for Seventy-One Thousand Five Hundred Seventy-Three (71,573) shares of said Class A stock, One Hundred Thousand (100,000) shares of Class B stock and One Hundred Thousand (100,000) shares of Class C stock of said Senior Corporation, to be issued to the stockholders of this corporation at the rate of one (1) share of Class A stock, Class B stock, and Class C stock of said Senior Corporation for each share respectively of Class A stock, Class B stock, and Class C stock held by the stockholders of this corporation.

Further resolved, that the proper officers of this corporation be and they hereby are authorized to make or consent to any amendments of, or additions to, said plan of reorganization and recapitalization by said officers deemed necessary or advisable to fully carry out the intents and purposes of said plan of reorganization and recapitalization.

Further resolved, that the proper officers of this corporation be and they hereby are authorized to do all things and to execute all papers and documents by the said officers deemed necessary or advisable to consummate or put into full force and effect said plan of reorganization and recapitalization and any amendments thereof or additions thereto.

There being no further business to come before the meeting, on motion the same adjourned.

HORACE S. MAYNARD, *Secretary.*

Approved:

F. J. FISHER, *President.*

We, the undersigned, being all the Stockholders of Senior Investment Corporation do hereby certify that we were present at a special meeting of the Stockholders of said corporation held on the 24th day of August, A. D. 1933, and took part therein, and hereby waive any and all notice of said meeting; that the above and foregoing minutes are a true and correct record and statement of the action taken at said meeting and the resolutions adopted thereat, and we do hereby ratify, approve and confirm all action

taken at said meeting and the resolutions adopted thereat, all as set out in the foregoing minutes of the meeting of the Stockholders.

F. J. FISHER.
BURTHA M. FISHER.
ANDREW E. BALDWIN.

116 *Joint Exhibit A–11*

SENIOR INVESTMENT CORPORATION

WAIVER OF NOTICE OF SPECIAL MEETING OF STOCKHOLDERS

We, the undersigned, being all of the stockholders of Senior Investment Corporation, a Michigan corporation, do hereby severally waive any and all notice of a special meeting of the stockholders of said corporation and we do hereby consent and agree that such a special meeting may and shall be held at the office of the Company, 2400 Fisher Building, in the City of Detroit, Michigan, on the 28th day of August, A. D. 1933, at two o'clock in the afternoon, and we do hereby consent that at such meeting consideration may be given and action taken with respect to the decrease of the capital stock of this corporation and otherwise amending the Articles of Incorporation of this corporation as heretofore amended as may be determined at such special meeting to be advisable and also to transact such other business as may be presented to the meeting.

Dated August 28, 1933.

F. J. FISHER.
BURTHA M. FISHER.
ANDREW E. BALDWIN.

SENIOR INVESTMENT CORPORATION

MINUTES OF SPECIAL MEETING OF STOCKHOLDERS

A Special Meeting of the stockholders of Senior Investment Corporation, a Michigan corporation, was held at the office of the Company, 2400 Fisher Building, in the City of Detroit, Michigan, on August 28, 1933, at two o'clock in the afternoon, pursuant to written waiver of notice of such meeting signed by all of the stockholders fixing the time and place of said meeting.

The following stockholders were present in person:

117 Fred J. Fisher,
Burtha M. Fisher,
Andrew E. Baldwin,

being all of the stockholders of said corporation.

The President, Mr. Fred J. Fisher, acted as Chairman of the meeting, and the Secretary, Mr. Horace S. Maynard, recorded

The Chairman stated that pursuant to the agreement and plan of reorganization and recapitalization of Senior Investment Corporation, a corporation under the name of Senior Corporation has been duly organized under the laws of the State of Delaware with an authorized capital stock as in said agreement and plan specified. The Chairman further stated that at a meeting of the Board of Directors of said Senior Corporation held on this date, resolutions were adopted ratifying and adopting said agreement and plan of reorganization and recapitalization, and authorizing the proper officers of said Senior Corporation to execute said agreement and plan of reorganization and recapitalization. The Chairman further stated that pursuant to authorization by the Board of Directors and stockholders of this corporation, the proper officers of this corporation had executed in the name and on behalf of this corporation an instrument of assignment and transfer, assigning and transferring to said Senior Corporation the assets and property specified in Annex A to said agreement and plan of reorganization and recapitalization; that said instrument of assignment and transfer had been delivered to said Senior Corporation and that at said meeting of the Board of Directors of Senior Corporation the assignment and transfer of said assets and property and the instrument of assignment and transfer evidencing the same were accepted, and that it was resolved at the meeting of the Board of Directors of said Senior Corporation that said Senior Corporation issue in exchange for said assets and property so transferred to it, to the stockholders of this corporation Seventy-one Thousand Five Hundred Seventy-three (71,573) shares of the Class *A* stock, One Hundred Thousand (100,000) shares of
118 the Class B stock and One Hundred Thousand (100,000) shares of the Class C stock of said Senior Corporation, all fully paid and non-assessable, in accordance with the provisions of said agreement and plan of reorganization and recapitalization.

The Chairman stated that the certificates representing said shares of stock would be delivered to the stockholders of this corporation as soon as the same could be prepared and printed.

The Chairman stated that part I of the plan of reorganization and recapitalization had been to all intents and purposes fully consummated, and that in order that said agreement and plan of reorganization and recapitalization be fully put into force and effect, it was necessary to consummate part II of said plan of reorganization and recapitalization, and that said part II of said plan provided for the amendment of the articles of incorporation of this corporation so as to reduce the capital of this corporation by changing the authorized capital stock of this corporation and otherwise amending the articles of incorporation of this corpora-

tion, all as set out in part II of said agreement and plan of reorganization and recapitalization.

Thereupon the following resolution was moved, seconded, and unanimously carried:

Resolved, that the capital stock of this Corporation be decreased from 300,000 shares without any par or nominal value, consisting of the following classes of stock without par value: Class A, 100,000 shares: Class B, 100,000 shares; Class C, 100,000 shares; to 100,00 shares of the par value of $5.00 per share to be designated as Class A stock, and 100,000 shares of the par value of $1.00 per share to be designated as Class C stock.

And be it further resolved, that in order to carry out the foregoing resolution the Articles of Incorporation as heretofore amended be further amended by striking out Articles V and IX thereof and inserting in lieu thereof Articles V and IX which shall read as follows:

119

ARTICLE V

(1) The total capital stock authorized is two hundred thousand (200,000) shares, consisting of the following classes of stock:

Class A stock—one hundred thousand (100,000) shares, par value Five Dollars ($5.00) per share.

Class C stock—one hundred thousand (100,000) shares, par value One Dollar ($1.00) per share.

(2) The holders of Class A stock shall not be entitled to vote for Directors nor upon any other matter, except as provided by law, but the sole and exclusive voting power, except as provided by law, shall belong to and be vested in the holders of Class C stock.

(3) *Transfers to capital.*—The earnings and profits of the corporation to the extent of $6,444,239.96 shall from time to time be transferred to capital or capital surplus or surplus, and anything herein contained or otherwise to the contrary notwithstanding, no dividends, whether cumulated or current, shall be paid or set aside on any shares of stock of the corporation until earnings and profits of the corporation in the sum of $6,444,239.96 have been so transferred to capital or capital surplus or surplus.

(4) *Class A stock.*—The shares of Class A stock shall be entitled to receive, except as herein otherwise provided, when and as declared by the Board of Directors, out of the surplus or net profits of the Corporation, cumulative dividends at the rate of Seven and 35/100ths Dollars ($7.35) per share per annum, and no more, payable at least semi-annually on the 1st days of March and September of each year, and at such other times as the Board of Directors may from time to time determine. Such dividends may,

120 in the discretion of the Board of Directors, be paid either

in cash or—in whole or in part—in stocks or other securities, at the market value of such stock or securities at the time of such distribution.

In the event of any liquidation or dissolution, or winding up—whether voluntary or otherwise—of the corporation, the Class A stock shall be entitled to receive in full out of the assets—whether capital or surplus—payable either in assets of the corporation other than cash or in cash or partly in cash and partly in such assets, the sum of One Hundred Eighty-three and 76/100ths Dollars ($183.76) per share, plus an amount equal to Seven and 35/100ths Dollars ($7.35) per share per annum for the period from July 29, 1929 to August 31, 1933, and plus an amount equal to all accrued but unpaid dividends thereon after August 31, 1933, before any payment shall be made to or on any of the shares of stock of this corporation.

Class A stock may be redeemed, in whole or in part, at any time or from time to time, at the option of the Board of Directors, at such price per share as may be agreed between the shareholder whose shares are to be redeemed and the Company; provided, however, that such agreed price shall in no event exceed One Hundred Eighty-three and 76/100ths Dollars ($183.76) per share and that such redemption and the price agreed to be paid shall in each instance be approved in writing by the holders of not less than eighty percent (80%) of the Class A shares then outstanding; and there shall be added to such agreed redemption price the unpaid portion of the following amounts on the shares to be redeemed:

(a) $7.35 per share per annum for the period from July 29, 1929, to August 31, 1933; and

(b) An amount equal to all accrued and unpaid dividends thereon after August 31, 1933.

The agreement and approval for such optional redemption price may provide that such optional redemption price
121 may be paid in assets of the Corporation other than cash or in cash or partly in such assets and partly in cash. If less than all of the outstanding Class A stock is to be redeemed, the stock to be redeemed shall be selected in such manner as the Board of Directors may determine. In the event it shall be determined to pay for the redemption of any or all of the shares of the Class A stock at any time outstanding either entirely or partially in such assets of the Corporation other than cash, the assets so to be utilized and the credit to be received therefor on the redemption price shall be fixed by agreement between the company and the shareholder whose Class A shares are to be redeemed, subject at all times, however, to the approval in writing of the holders of not less than eighty percent (80%) of the Class A shares then outstanding. Notice of the intention to redeem shall be given by mailing notice

thereof, specifying the date and place of redemption—and if less than all the certificates to be redeemed—to each holder of record of shares to be redeemed at the last address of such holder appearing on the stock registry of this corporation.

On any redemption of any of the Class A stock of this Corporation the Corporation may deposit the aggregate redemption price and/or the assets of this Corporation other than cash to be utilized in such redemption, with any bank or trust company, either in the City of Detroit or City of New York, named in such notice, payable or deliverable as aforesaid to the respective record holders of the shares to be redeemed, on endorsement and surrender of their certificates in this Corporation; and thereupon said holders shall cease to be stockholders with respect to such shares, and from and after the making of such deposit said holders shall have no interest in or claim against the Corporation with respect to such shares but shall be entitled only to receive
122 said moneys or assets other than cash from said bank or trust company without interest. Any moneys or assets other than cash unclaimed at the end of six years from the date of the said deposit shall be paid or redelivered to the Corporation. No stock so redeemed shall ever be reissued by the corporation.

(5) *Class C stock.*—Subject to the foregoing provisions of this Article V hereof and after an amount equal to the cumulated and unpaid dividends on said Class A stock for the period from July 29, 1929 to August 31, 1933, at the rate of Seven and 35/100ths Dollars ($7.35) per share per annum and plus an amount equal to all cumulated and unpaid dividends on said Class A stock for the period from and after August 31, 1933, and the dividends for the current semi-annual period shall have been declared and paid, the Board of Directors may at any time and from time to time declare dividends upon the Class C stock of the Corporation.

In the event of liquidation, dissolution or winding up of the Corporation, the Class C stock after payment in full to the holders of the Class A stock of the amounts herein required to be paid to them, shall be exclusively entitled to share ratably in all the remaining assets and property of the Corporation.

(6) The total amount of stock outstanding is 171,573 shares, consisting of 71,573 shares of Class A stock of the par value of Five Dollars ($5.00) per share, and 100,000 shares of Class C stock of the par value of One Dollar ($1.00) per share. The 100,000 shares of Class B stock authorized by the original articles of association and issued pursuant thereto have been surrendered to the corporation by the holders thereof for cancellation.

(7) The capital of the corporation shall consist of an
123 amount equal to the aggregate par value of all the shares thereof having par value, and the excess, if any, at any

given time of the total net assets of the corporation over the amount so determined to be capital shall be surplus, all or any part of which surplus the Board of Directors (subject to the limitations contained in the Articles of Incorporation as amended) in its discretion may apply to the reduction of the book value of the fixed assets of the good will or other capital assets of the corporation, or on account of capital losses, or use as otherwise permitted by law.

ARTICLE IX

Special statements pertaining to the primary organization of this corporation and not included in the foregoing requirements:

(a) Except as hereinafter provided in this paragraph, no holder of any stock of this corporation shall be entitled as of right to purchase or subscribe for any part of any unissued stock of this corporation, or any new or additional stock of any class to be issued by reason of any increase in the authorized capital stock of this corporation, or of any issue of securities of the corporation convertible into stock, whether such stock or securities be issued for money or for a consideration other than money. When any such unissued stock or any such additional authorized issue of new stock or such securities convertible into stock are to be issued and disposed of, it may be issued and disposed of by the Board of Directors to such persons, firms, corporations, or associations and upon such terms as the Board of Directors may in their discretion determine without offering to the stockholders then of record of any class of stockholders any thereof on the same terms or any terms; provided, however, that no Class C stock shall be issued or sold except after having first been offered for subscription to the holders of the then outstanding Class C stock according to their respective shares.

124 (b) In the absence of fraud no contract or other transaction, with any other corporation or any individual, association, or firm, shall be in any way affected or invalidated by the fact that any of the directors of the corporation are interested in such other corporation, association, or firm, or personally interested in such contract or transaction, nor shall any director so interested be liable to account to the corporation for any profit made by him from or through any such contract or arrangement so adopted by the Board of Directors or which may be ratified or approved by the holders of the Class C stock, by reason of such director holding such office or the fiduciary relationship thereby established. Any director of this corporation may vote upon any contract or other transactions between this corporation and any subsidiary or affiliated corporation without regard to the

fact that he is also a director of such subsidiary or affiliated corporation.

(c) Any contract, transaction, or act of the corporation or of the Board of Directors, which shall be ratified by a majority of a quorum of the voting stock at any annual meeting or at any special meeting called for such purpose shall be as valid and binding as though ratified by every stockholder of the corporation; provided, however, that any failure of the voting stockholders to approve or ratify such contract, transaction or act, when and if submitted, shall not be deemed in any way to render the same invalid nor to deprive the directors or officers of their right to proceed with such contract, transaction or act.

(d) The Board of Directors may from any funds available, after all dividend payments on the Class A stock have been made or set aside for the current semi-annual period, devote so much of the remaining available funds of the corporation to one or more religious, charitable, scientific, literary, or educational pur-
125 poses, and to the end may make payment of all or any part of such funds to such Corporation, trust, community chest, fund, foundation, post or organization of war veterans, institutions, church, school association, or person, or any member of the foregoing as in the sole discretion of the Board of Directors is best qualified to carry out the purposes at the time sought to be fulfilled or accomplished. The matters stated in this paragraph (d) of Article IX shall be construed as objects and purposes of this Corporation, as well as stating the powers of the Board of Directors with respect to such objects and purposes.

(e) Authority is hereby specifically conferred upon the Board of Directors of the Corporation at any time and from time to time, to mortgage, pledge or hypothecate the property of the Corporation, in whole or in part, for the purpose of securing any obligation of the Corporation that may from time to time be created or incurred.

The Chairman stated that upon the filing of said amendment to the articles of incorporation of this corporation, the authorized capital stock of this corporation would be Two Hundred Thousand shares, consisting of One Hundred Thousand (100,000) shares of the Class A stock of the par value of Five Dollars ($5.00) per share and One Hundred Thousand (100,000) shares of the Class C stock of the par value of One Dollar ($1.00) per share, and that pursuant to said plan of reorganization and recapitalization it would be necessary for the holders of the Class B stock of this corporation to surrender the same for cancellation, and to provide for the appropriate stamping of the certificates of Class A stock and Class C stock now outstanding to evidence the change in the

capital structure of this Corporation caused by the consummation of said plan of reorganization and recapitalization.

Thereupon the following resolutions were moved and seconded and by the affirmative vote of the holders of all of the shares entitled to vote and by the affirmative vote of the holders of all
126 shares of each class whose right, privileges and preferences are changed thereby adopted:

Resolved, that the holders of the Class B stock of this corporation surrender for cancellation the certificates representing the Class B stock of this corporation; and

Further resolved, that the outstanding certificates of the Class A stock and Class C stock of the Corporation be stamped on the face and reverse side with a legend substantially as follows:

"Class A Stock became stock of the par value of $5.00 per share and Class C stock became stock of the par value of $1.00 per share, and Class B stock was eliminated and the powers, preferences and rights and the qualifications, limitations or restrictions with respect to the Class A stock and Class C stock were amended by amendment to the Articles of Incorporation effective August 29, 1933, pursuant to Plan of Reorganization and Recapitalization dated August 23, 1933."

Further resolved, that the President or Vice-President and the Secretary or Assistant Secretary of this Corporation be and they hereby are authorized and directed to execute in the name of this Corporation and to acknowledge the certificate of amendment to the articles of incorporation of this Corporation and to file the same as required by law.

There being no further business to come before the meeting, on motion the same adjourned.

HORACE S. MAYNARD, *Secretary.*

Approved:

F. J. FISHER, *President.*

127 *Joint Exhibit A-12*

SENIOR INVESTMENT CORPORATION

WAIVER OF NOTICE OF SPECIAL MEETING OF THE BOARD OF DIRECTORS

We, the undersigned, constituting all of the Board of Directors of Senior Investment Corporation, a Michigan corporation, do hereby severally waive any and all notice of a special meeting of the directors of said corporation, and we do hereby consent and agree that a special meeting of the board of directors of said corporation may and shall be held at the office of the Company, 2400

Fisher Building, in the City of Detroit, Michigan, on the 28th day of August, A. D. 1933, at three o'clock in the afternoon.

Dated August 28, 1933.

F. J. FISHER.
ROBERT C. SHIELDS.
HORACE S. MAYNARD.
ANDREW E. BALDWIN.
LEO M. BUTZEL.

SENIOR INVESTMENT CORPORATION

MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS

A Special Meeting of the Board of Directors of Senior Investment Corporation was held at the office of the Company at 2400 Fisher Building in the City of Detroit, Michigan, on August 28, 1933, at three o'clock in the afternoon, pursuant to a written waiver of notice of such meeting signed by all of the Directors fixing the time and place of said meeting.

The following Directors were present in person:

Fred J. Fisher,
Robert C. Shields,
Horace S. Maynard,
Andrew E. Baldwin.

128 Mr. Fred J. Fisher, the President, presided, and Mr. Horace S. Maynard acted as Secretary of the meeting.

The Chairman stated that at a special meeting of the Stockholders of this Corporation, held at two o'clock in the afternoon on this date for the express purpose of reducing the capital stock of this Corporation and otherwise amending the Articles of Incorporation of this Corporation, as heretofore amended, resolutions and amendments were approved and adopted by the affirmative vote of the holders of all of the shares entitled to vote, and by the affirmative vote of the holders of all of the shares of each class of stock, whose rights, privileges and preferences are changed thereby decreasing the capital stock of this Corporation from 300,000 shares without any par or nominal value, consisting of 100,000 shares of Class A stock, 100,000 shares of Class B stock, and 100,000 shares of Class C stock, to 100,000 shares of Class A stock of the par value of $5.00 per share, and 100,000 shares of Class C stock of the par value of $1.00 per share, and otherwise amending the Articles of Incorporation of this Corporation, as heretofore amended.

The Chairman presented and read to the meeting the minutes of the said special meeting of the Stockholders, and the resolutions and amendments adopted thereat, and on motion duly made

and seconded and by the affirmative vote of all directors present, the following resolutions were adopted:

Resolved that the action of the Stockholders of this Corporation in decreasing the capital stock of this Corporation and otherwise amending the Articles of Incorporation of this Corporation as heretofore amended, all as set out in the resolutions and amendments adopted by the Stockholders of this Corporation at a special meeting of the Stockholders of this Corporation held on this date, and the said resolutions and amendments be and the same are hereby in all respects ratified, approved and confirmed.

Further resolved that the holders of the Class B stock of
129 this Corporation surrender for cancellation the certificates representing the Class B stock of this Corporation; and

Further resolved that the outstanding Certificates of the Class A stock and Class C stock of the Corporation be stamped on the face and reverse side with a legend substantially as follows:

"Class A Stock became stock of the par value of $5.00 per share and Class C stock became stock of the par value of $1.00 per share, and Class B stock was eliminated and the powers, preferences and rights and the qualifications, limitations or restrictions with respect to the Class A stock and Class C stock were amended by amendment to the Articles of Incorporation effective August 29, 1933, pursuant to Plan of Reorganization and Recapitulation dated August 23, 1933."

Further resolved that the President or Vice-president and the Secretary or Assistant Secretary of this Corporation be and they hereby are authorized and directed to execute in the name of this Corporation and to acknowledge the certificate of amendment to the articles of incorporation of this Corporation and to file the same as required by law.

There being no further business to come before the meeting on motion the same adjourned.

HORACE S. MAYNARD, *Secretary.*

Approved:

F. J. FISHER, *President.*

130 *Joint Exhibit A-13*

SENIOR CORPORATION

MINUTES OF FIRST MEETING OF BOARD OF DIRECTORS

The first meeting of the Board of Directors of Senior Corporation was held at 2400 Fisher Building, in the City of Detroit,

Michigan, on the 28th day of August, A. D. 1933, at ten o'clock in the forenoon.

Present—
Fred J. Fisher,
Robert C. Shields,
Andrew E. Baldwin,
Horace S. Maynard.

Absent—
Leo M. Butzel.

Mr. Fisher was chosen temporary Chairman and Mr. Maynard was chosen temporary secretary of the meeting.

The Secretary presented and read the following waiver of notice of the meeting, signed by all the directors.

WAIVER OF NOTICE, FIRST MEETING OF THE BOARD OF DIRECTORS

We, the undersigned, being all the directors of Senior Corporation do hereby waive notice of the time, place and purpose of the first meeting of the board of directors of said corporation.

We designate the 28th day of August, 1933, at ten o'clock in the forenoon, as the time, and 2400 Fisher Building, Detroit, Michigan, as the place of said meeting, the purpose thereof being to adopt by-laws, elect officers, authorize the issue of the capital stock, complete the organization of said corporation, and to transact such other business as may be necessary or advisable.

Dated August 28, 1933.

F. J. FISHER.
ROBERT C. SHIELDS.
ANDREW E. BALDWIN.
HORACE S. MAYNARD.
LEO M. BUTZEL.

131 The minutes of the meeting of incorporators were read and approved.

Upon motion, duly made, seconded and carried, it was

Resolved, that the by-laws adopted at the incorporators' meeting be adopted by this board as and for the by-laws of this corporation.

The following persons were nominated for officers of the corporation to serve until their respective successors are chosen and qualify:

President—Fred J. Fisher.
Vice-President—Andrew E. Baldwin.
Secretary—Horace S. Maynard.
Treasurer—Horace S. Maynard.
Assistant-Treasurer—John C. Moons.

Ballot having been duly had and all the directors present having voted, the chairman announced that the aforesaid persons had been unanimously elected to the offices set before their respective names.

The President thereupon took the chair.

It was ordered that the secretary be sworn to the faithful discharge of his duty and he thereupon subscribed and swore to the oath of office and entered upon the discharge of his duties.

Said Secretary's oath is as follows:

SECRETARY'S OATH

STATE OF MICHIGAN,
County of Wayne, ss:

I, Horace S. Maynard, do solemnly promise and swear that I will faithfully, impartially and justly perform the duties of Secretary of Senior Corporation, a corporation of the State of Delaware, according to the best of my abilities and understanding. So help me God.

HORACE S. MAYNARD.

132 Subscribed and sworn to before me this 28th day of August, A. D. 1933.

[SEAL] JOHN C. MOONS, *Notary Public, Wayne County, Michigan.*

My Commission Expires: November 14, 1936.

Upon motion, duly made, seconded and carried, it was

Resolved, that the forms of stock certificates presented and read be approved and adopted, and that the Secretary be instructed to insert a specimen thereof in the minute book.

Upon motion, duly made, seconded and carried, it was

Resolved, that the seal, an impression of which is herewith affixed, be adopted as the corporate seal of the corporation.

The Secretary was authorized and directed to procure the proper corporate books.

Upon motion, duly made, seconded and carried, it was

Resolved (here insert bank resolution).

Upon motion, duly made, seconded and carried, it was

Resolved, that the Corporation Trust Company be and is hereby appointed the agent of this corporation, in charge of the principal office in Delaware and of the books required by law to be kept in that office, and the agent upon whom process against this corporation may be served in accordance with the laws of Delaware.

Further resolved, that said Trust Company may apply to and act upon the instructions of Stevenson, Butzel, Eaman and Long, the counsel of this corporation, in respect to any questions arising in connection with said agency.

Further resolved, that the Secretary be and is hereby
133 authorized to sign and seal with the corporation's seal a certificate of authorization to said Trust Company in the form submitted at this meeting.

The President stated that this corporation was organized pursuant to an agreement and plan of reorganization and recapitalization of Senior Investment Corporation, a Michigan corporation, and which agreement and plan was executed by said Senior Investment Corporation and all of its stockholders. The President thereupon presented and read to the meeting a copy of said agreement and plan of reorganization and recapitalization, and upon motion duly made and seconded, and by the affirmative vote of all of the directors present, a copy of said agreement and plan of reorganization and recapitalization as presented and read to the meeting, was ordered initialed by the Secretary and to be inserted in the minute book of this corporation immediately following the minutes of this meeting.

Thereupon, on motion duly made and seconded and by the affirmative vote of all of the directors present, the following resolutions were adopted:

Resolved, that the agreement and plan of reorganization and recapitalization of Senior Investment Corporation be and the same hereby is adopted and ratified, and that this corporation does hereby become a party thereto, and the proper officers of this corporation be and they hereby are authorized and directed to execute the said agreement and plan of reorganization and recapitalization in the name and on behalf of this corporation, with the same force and effect as if said agreement and plan of reorganization and recapitalization had been so executed by said officers in the first instance.

The Chairman presented to the meeting an instrument of assignment and transfer duly executed in the name and on behalf of said Senior Investment Corporation, assigning and transferring to this corporation the assets and property specified in Annex A to
said agreement and plan of reorganization and recapitali-
134 zation. Thereupon, on motion duly made and seconded, and by the affirmative vote of all of the directors present, the following resolutions were adopted:

Resolved, that this corporation does hereby accept the assignment and transfer by said Senior Investment Corporation to this corporation of the assets and property specified in Annex A to said agreement and plan at the values therein stated, and does hereby accept the delivery of the said instrument of assignment and transfer evidencing the same, and that in exchange therefor this corporation issue to the stockholders of said Senior Investment Corporation Seventy-One Thousand Five Hundred Seventy-Three

(71,573) shares of the Class A stock, One Hundred Thousand (100,000) shares of the Class B stock and One Hundred Thousand (100,000) shares of the Class C stock of this corporation all fully paid and nonassessable at the rate of One (1) share of Class A stock, Class B stock and Class C stock of this corporation for each share respectively of Class A stock, Class B stock and Class C stock of the Senior Investment Corporation held by such stockholders.

Further resolved, that the Board of Directors does hereby adjudge and declare the assets and property to be received in exchange for the issuance of 71,573 shares of Class A stock of the par value of $10.00 per share, 100,000 shares of Class B stock of the par value of $10.00 per share and 100,000 shares of Class C Stock without par value of this corporation to be of the value of at least $1,715,731.00 and necessary for the business of this corporation.

Further resolved, that the capital of this corporation be and the same hereby is fixed at the sum of $1,715,731.00.

Further resolved, that the proper officers of this corporation be and they hereby are authorized to make or consent to any amendments of, or additions to, said plan by said officers deemed
135 necessary or advisable to fully carry out the intents and purposes of said plan of reorganization and recapitalization.

Further resolved, that the proper officers of this corporation be and they hereby are generally authorized and directed to do all things and to execute any and all papers or documents by said officers deemed necessary or advisable to consummate and put into full force and effect said plan of reorganization and recapitalization.

There being no further business to come before the meeting, on motion the same adjourned.

HORACE S. MAYNARD, *Secretary.*

Approved:

F. J. FISHER, *President.*

F 439-9-32—Corporation-Resolution
ABC-10-25-32

I, Horace S. Maynard, Secretary of Senior Corporation, the corporation described herein as "this corporation," hereby certify that the following is a true copy of resolutions adopted by the Board of Directors of this corporation at a meeting duly held, a quorum being present, on August 29th, 1933 and that such resolutions are now in full force and effect:

Resolved, that Bankers Trust Company of the City of New York is designated a depositary of this corporation; and

Further resolved, that all drafts, checks, and other instruments or orders for the payment of money drawn against the account

or accounts of this corporation shall be signed by any two of the following:

President.
Vice President.
Secretary and Treasurer.

136 Further resolved, that the depositary above designated is authorized to place to the credit of the account, or any of the accounts, of this corporation, funds, drafts, checks, or other property delivered to it for deposit for account of this corporation, whether or not indorsed with the name of this corporation by rubber stamp, facsimile, mechanical, manual, or other signature, and any such indorsement by whomsoever affixed shall be the indorsement of this corporation, provided that if any such funds, drafts, checks, or other property shall bear, or be accompanied by, directions (by whomever made) for deposit to a specific account, then such deposit shall be to the credit of such specific account; and

Further resolved, that the depositary is hereby directed to accept and/or pay and/or apply without limit as to amount, without inquiry and without regard to the application of any such draft, check, instrument or order for the payment of money, or the proceeds thereof, any draft, check, instrument, or order for the payment of money drawn on such account or accounts, which draft, check, instrument, or order for the payment of money bears the signature or signatures as required by these resolutions, including drafts, checks, instruments, or orders for the payment of money, to the order of any person whose signature appears thereon, or of any other officer or officers, agent, or agents of this corporation, which may be deposited with, or delivered or transferred to, the depositary or to any other person, firm, or corporation, for the personal credit or account of any such officer or agent; and the depositary shall not be liable for any disposition which any such officer or agent shall make of all or any part of any draft, check, instrument or order for the payment of money drawn on such account or accounts or the proceeds thereof, notwithstanding that such disposition may be for the personal account or benefit or in payment of the individual obligation of any such officer or agent to the depositary or otherwise.

	Name	*Title*
137	Fred J. Fisher	President.
	Andrew E. Baldwin	Vice President.
	Horace S. Maynard	Secretary and Treasurer.

In witness whereof, I have hereunto subscribed my signature and affixed the seal of this corporation this twenty-ninth day of August, 1933.

[SEAL] HORACE S. MAYNARD,*
Secretary.

Confirmed ----------
(Official Title)

GENERAL RESOLUTION—FORM B

I certify that the following is a true copy of a certain resolution of the Board of Directors of Senior Corporation, a Corporation duly organized and existing under the laws of Delaware, having its principal place of business in Wilmington, Delaware, duly adopted in accordance with the By-Laws at, and recorded in the minutes of, a meeting of the said Board on August 29th, 1933, and not subsequently rescinded or modified:

RESOLVED

1. That an account or accounts be opened for and in the name of this Corporation with The National City Bank of New York, Head Office, and that the said Bank is hereby authorized to pay or otherwise honor any checks, drafts or other orders issued from time to time for debit to said account or accounts when signed by any two, President, Vice President, Secretary and Treasurer, inclusive of any such in favor of any said person(s), and that the said account or accounts be reconciled from time to time by said person(s), or his or their designees.

138 2. That President or Vice President or Treasurer is/are hereby authorized for and on behalf of this Corporation to: Discount and/or negotiate notes, drafts or other commercial paper; Apply for letters or other forms of credit; Borrow money, directly or indirectly, with or without security; Pledge or otherwise hypothecate any property of the Corporation, and to transact any and all such other business with said Bank as at any time may be deemed by the said person(s) transacting the same to be advisable, and in reference to any of the authority hereby conferred to make, enter into, execute and deliver to said Bank such negotiable or non-negotiable instruments, indemnity or other agreements, assignments, endorsements, hypothecations, pledges, receipts or other undertakings or obligations as to said person(s) executing the same may seem necessary or desirable, and *and* all withdrawals of money and/or other transactions heretofore had in behalf of this corporation with said Bank being hereby ratified, confirmed

*If the Secretary under the powers conferred by the above resolutions is authorized to sign alone, the certification of the resolutions must be confirmed below by another officer.

and approved; also, the said Bank may rely upon the authority conferred by this entire resolution until the receipt by it of a certified copy of a resolution of this Board revoking or modifying the same.

I further certifiy that the following are the officers of the said Corporation, duly qualified and now acting as such:

Name	*Title of office held*
Fred J. Fisher	President.
Andrew E. Baldwin	Vice President.
Horace S. Maynard	Secretary and Treasurer.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the said Corporation this 29th day of August, 1933.

[CORPORATE SEAL] HORACE S. MAYNARD,
Secretary.

139 CORPORATE RESOLUTION—SENIOR CORPORATION

I hereby certify to J. P. Morgan & Co., of the City and State of New York, that at a meeting of the Board of Directors of Senior Corporation of Delaware, duly called and held at No. 2400 Fisher Building, in the City of Detroit, State of Michigan, on the 29th day of August, 1933, the following resolutions were duly adopted and are now in full force and effect.

Resolved that J. P. Morgan & Co., of the City and State of New York, be designated as a depository of this corporation and that funds of this corporation deposited with said J. P. Morgan & Co., be subject to withdrawal upon checks, notes, drafts, bills of exchange, acceptances, undertakings or other orders for the payment of money when signed on behalf of this corporation by any two (2) of its following officers, to wit:

Name	*Office*
Fred J. Fisher	President.
Andrew E. Baldwin	Vice President.
Horace S. Maynard	Secretary-Treasurer.

Resolved, that J. P. Morgan & Co., is hereby authorized to pay any such orders and also to receive the same for credit of or in payment from the payee or any other holder without inquiry as to the circumstances of issue or the disposition of the proceeds even if drawn to the individual order of any signing officer or tendered in payment of his individual obligations.

Resolved that the Secretary of this corporation be and he hereby is authorized to certify to J. P. Morgan & Co., the foregoing resolutions and that the provisions thereof are in conformity with the character and bylaws of this corporation.

I further certify that there is no provision in the charter or bylaws of said corporation limiting the power of the Board

140 of Directors to pass the foregoing resolutions and that the same are in conformity with the provisions of said charter and bylaws.

I further certify that the present officers of this corporation are as follows:

Name	*Office*
Fred J. Fisher	President.
Andrew E. Baldwin	Vice President.
Horace S. Maynard	Secretary-Treasurer.

In witness whereof, I have hereunto set my hand as Secretary of said corporation and affixed the corporate seal this 5th day of September, 1933.

[COPORATE SEAL] HORACE S. MAYNARD,
Secretary.

Confirmed by _____

NOTE: To be confirmed only if secretary is authorized to sign alone on behalf of corporation.

141 In the Tax Court of the United States

ESTATE OF FRED J. FISHER, CHARLES T. FISHER, EDWARD F. FISHER, AND LEO M. BUTZEL, EXECUTORS, AND BURTHA M. FISHER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 104601

Benjamin E. Jaffe, Esq., and R. M. O'Hara, Esq., for the petitioner.

Philip M. Clark, Esq., for the respondent.

Memorandum opinion

Entered February 9, 1944

STERNHAGEN, Judge: The Commissioner determined a deficiency of $1,231,636.92 in 1934 income tax. A distribution in 1934 by Senior Investment Corporation of 43,300 common shares of General Motors Corporation was determined to be a taxable dividend. The facts are stipulated.

Fred J. Fisher and his wife, Burtha M. Fisher, residents of Detroit, Michigan, filed a 1934 joint federal income tax return at Detroit. Fred J. Fisher died on July 14, 1941. On January 31, 1934, he owned 71,573 Class A shares of Senior Investment Corporation, a Michigan corporation—all of the shares of that class

then outstanding. His cost or basis of the 71,573 Class A shares was not less than $1,723,881.25. On January 31, 1934, without surrendering any of the Class A shares, he received as a distribution on the Class A shares 43,300 common shares of General Motors Corporation having a value of $1,723,881.25.

Senior Investment Corporation was incorporated on July 29, 1929, with 300,000 shares of no par value stock consisting of 100,000 shares each of Class A, B, and C stock. The cost to the Fishers and the July 29, 1929, fair market value of the assets, principally securities, transferred by them to Senior Investment Corporation, and the number of shares issued to them therefor by Senior are as follows:

142	Cost	July 29, 1929, fair market value	Number of senior shares issued
Fred J. Fisher	$12,957,242.88	$42,943,427.78	71,573 Class A 79,805 Class C
	894,060.02	40,000,000.00	100,000 Class B
Burtha M. Fisher	699,350.00	5,486,250.00	9,143 Class A 10,195 Class C

The remaining 10,000 Class C shares were issued to an employee for no payment. On December 9, 1931, Senior Investment Corporation retired the 9,143 Class A shares held by Burtha M. Fisher.

In computing its gain or loss from the sale or other disposition of assets received for its shares on incorporation, Senior Investment Corporation used the fair market value of such assets on the date received, as a result of which the corporation had a large operating deficit on January 31, 1934, when the General Motors Corporation shares were distributed to Fisher. If it had used the transferors' cost instead, as was done by the Commissioner, it would have had on January 31, 1934, surplus in excess of $1,723,881.25 available for the distribution of dividends.

Whether, in 1934, Fisher received a taxable dividend measured by the fair market value of the General Motors shares depends upon whether Senior Investment Corporation had a surplus available for the distribution of dividends, and that in turn depends upon whether the corporation, in computing its gain or loss on sales of assets acquired by it from the Fishers in exchange for its own shares, should have used the fair market value of such assets at the time of the exchange or the transferors' cost. It has been held that the corporation's basis of assets thus acquired is the fair market value when acquired. Senior Investment Corp., 2 T. C. 124, 139; Dorothy Whitney Elmhirst, 41 B. T. A. 348; W. S. Farish & Co., 38 B. T. A. 150, affirmed 104 Fed. (2d) 833; F. J. Young Corp., 35 B. T. A. 860, affirmed 103 Fed. (2d) 137.

The Commissioner relies upon Article 115–1 of Treasury Regulations 86 under the 1934 Act, and later regulations containing

similar provisions, and Section 501 of the second Revenue
143 Act of 1940, amending Section 115 so as to provide that the basis to be used for earnings and profits is the substituted basis used for income tax purposes. However section 501 (c) provides that the amendment was not to be applied in any case pending on September 20, 1940, as this case was. In view of Section 501 (c), this decision is not controlled by the Revenue Act of 1940 but by the above decisions. It follows that the distribution of the 43,300 shares of common stock of General Motors Corporation to Fisher in 1934 was not a taxable dividend to him.

Decision will be entered under Rule 50.

In the Tax Court of the United States

Decision

Entered March 23, 1944

Pursuant to the Court's Memorandum Opinion, entered February 9, 1944, the respondent filed a computation which the petition agrees is in accordance with the Memorandum Opinion. It is

Decided that there is a deficiency of $212,716.47 in income tax for 1934.

[SEAL] (Signed) J. M. STERNHAGEN, *Judge.*

144 In United States Circuit Court of Appeals, Sixth Circuit

Petition for review

Filed June 22, 1944

Joseph D. Nunan, Jr., Commissioner of Internal Revenue, the above-named petitioner hereby petitions for review by the United States Circuit Court of Appeals for the Sixth Circuit of the decision entered by The Tax Court of the United States on March 23, 1944, deciding that there is a deficiency in the income tax liability of the Estate of Fred J. Fisher, Charles T. Fisher, Edward F. Fisher, and Leo M. Butzel, Executors, and Burtha M. Fisher, for the year 1934 in the amount of $212,716.47.

The joint Federal income tax return for the year in question was filed by Fred J. Fisher (now deceased) and Burtha M. Fisher husband and wife, with the Collector of Internal Revenue for the District of Michigan, whose office is located at Detroit, Michigan.

(Signed) SAMUEL O. CLARK, JR.,
CAR
Assistant Attorney General,
(Signed) J. P. WENCHEL,
CAR
Chief Counsel, Bureau of Internal Revenue,
Attorneys for Petitioner.

In United States Circuit Court of Appeals

Notice of filing petition for review

Filed June 22, 1944

To: BENJAMIN E. JAFFEE, Esq.,
2510 Fisher Building, Detroit, Michigan.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22nd day of June 1944, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit of the decision of The Tax Court here-
145 tofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 22nd day of June 1944.

B. D. GAMBLE,
Clerk, The Tax Court of the United States.

Service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this _____ day of June 1944.

Counsel for Respondents.

In United States Circuit Court of Appeals

Notice of filing petition for review

Filed July 24, 1944

To: Mr. Charles T. Fisher, Mr. Edward F. Fisher, and Leo M. Butzel, Executors of the Estate of Fred J. Fisher and Mrs. Burtha M. Fisher, Detroit, Michigan.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22nd day of June 1944, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit of the decision of The Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 22nd day of June 1944.

(Signed) J. P. WENCHEL,
CAR

Chief Counsel,
Bureau of Internal Revenue.

146 Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 30th day of June, 1944.

(Sgd.) LEO M. BUTZEL,
One of the Executors of Estate of Fred J. Fisher, Deceased (without prejudice),
(Sgd.) BURTHA M. FISHER,
Respondents.

In United States Circuit Court of Appeals

Statement of points

Filed August 29, 1944

Comes now the petitioner on review herein, by his counsel of record, and makes this concise statement of points on which he intends to rely on the review herein, to wit:

1. The Tax Court of the United States erred in ordering and deciding that there is a deficiency in income tax for the taxable year 1934 in the amount of only $212,716.47.

2. The Tax Court of the United States erred in failing and refusing to sustain that portion of the deficiency in tax found by the Commissioner which arose from his determination that the decedent taxpayer received a taxable dividend measured by the fair market value of the shares of stock of the General Motors Corporation distributed to him by the Senior Investment Corporation.

3. The Tax Court of the United States erred in holding and deciding "that the distribution of the 43,300 shares of common stock of General Motors Corporation to Fisher in 1934 was not a taxable dividend to him."

4. The Tax Court of the United States erred in holding and deciding, in effect that the cost to the Senior Investment Corporation of the assets received by it upon its organization from
147 the decedent taxpayer in a tax-free reorganization was, for the purpose of determining whether or not the distribution here in question constituted a taxable dividend, the market value of such assets at the time of the exchange rather than the cost of such assets to the transferor.

5. The Tax Court of the United States erred in failing to hold and decide that the basis of the Senior Investment Corporation's transferor, which is the statutory basis for computing taxable net income, is to be used in determining the earnings and profits of the Senior Investment Corporation available for distribution as dividends upon the distribution of shares of General Motors Corporation made to the decedent taxpayer in 1934.

6. The Tax Court of the United States erred in that its opinion and decision are contrary to law and the Commissioner's regulations.

(Signed) SAMUEL O. CLARK, Jr.,
CAR
Assistant Attorney General,
(Signed) J. P. WENCHEL,
CAR
Chief Counsel, Bureau of Internal Revenue,
Attorneys for Petitioner.

STATEMENT OF SERVICE

A copy of this statement of points was mailed to Benjamin E. Jaffe, Esq., 2510 Fisher Building, Detroit, Michigan, attorney for respondent, this date, August 29, 1944.

(Sgd.) CHAS. E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

148 In The Tax Court of the United States

Designation of contents of record on review

Filed August 29, 1944

To the Clerk of The Tax Court of the United States:

Now comes Joseph D. Nunan, Jr., Commissioner of Internal Revenue, the petitioner on review herein, by and through his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for the purpose of the review which he, the said petitioner on review, has heretofore taken to the United States Circuit Court of Appeals for the Sixth Circuit, hereby designates for inclusion in the record on review the following:

1. Docket entries.
2. Pleadings:

(a) Petition, including annexed copy of notice of deficiency and statement, with the following exceptions:

Eliminate subparagraphs (A) and (B) on page 2 of the petition, subparagraphs (A) and (B) on pages 3 to 7, inclusive, of the petition, subparagraph (D) on pages 11 to 15, inclusive, of the petition and paragraphs 1, 2 on page 16 of the petition.

Eliminate (1) sheet 3 of the statement, (2) paragraph "(D) continued" on sheet 4 of the statement, and (3) paragraphs (F) and (G) on sheet 5 of the statement.

(b) Answer.
3. Order for substitution of parties entered October 19, 1942.
4. Stipulation of Facts.
5. Memorandum opinion entered February 9, 1944.
6. Decision entered March 23, 1944.
7. Petition for review and notices of filing petition for review.
8. Statement of points.
9. Order extending time for transmission of certified record sur petition for review not included in record.
10. This designation of contents of record on review.

149 Wherefore, it is requested that copies of the record as above designated be prepared and transmitted to the United States Circuit Court of Appeals for the Sixth Circuit in accordance with the rules of said Court.

(Sgd.) SAMUEL O. CLARK, JR.,
CAR
Assistant Attorney General.

(Sgd.) J. P. WENCHEL,
CAR
Chief Counsel, Bureau of Internal Revenue,
Attorneys for Petitioner.

STATEMENT OF SERVICE

A copy of this designation of contents of record on review was mailed to Benjamin E. Jaffe, Esq., 2510 Fisher Building, Detroit, Michigan, attorney for respondent, this date, August 29, 1944.

(Sgd.) CHAS E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

[Clerk's certificate to foregoing transcript omitted in printing.]

150 In the Tax Court of the United States

Order enlarging time

Upon motion of counsel for petitioner, it is
Ordered that the time for preparation, transmission, and delivery of the record sur petition for review of the above entitled

proceeding in the United States Circuit Court of Appeals for the Sixth Circuit is extended to September 20, 1944.

(Signed) CHARLES P. SMITH,
Acting Presiding Judge.

Dated: Washington, D. C., July 17, 1944.

Now, Sept. 9, 1944, the foregoing order is certified from the record as a true copy.

[SEAL] B. D. GAMBLE, *Clerk*,
The Tax Court of the United States.

151 In United States Circuit Court of Appeals for the Sixth Circuit

Cause argued and submitted February 12, 1945

Before HICKS, ALLEN, and MARTIN, JJ.

This cause is argued by H. P. Zarky for Petitioner and by R. M. O'Hara for Respondents and is submitted to the court.

In United States Circuit Court of Appeals, Sixth Circuit

Judgment

Entered March 26, 1945

On petition to review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, it is now ordered, adjudged, and decreed by this Court that the decision of the said Tax Court in this cause be and the same is hereby affirmed.

In United States Circuit Court of Appeals, Sixth Circuit

No. 9858

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES T. FISHER, EDWARD F. FISHER, AND LEO M. BUTZEL, EXECUTORS OF THE ESTATE OF FRED J. FISHER, AND BURTHA M. FISHER, RESPONDENTS

Petition to Review a Decision of the Tax Court of the United States

Decided March 26, 1945

Before HICKS, ALLEN, and MARTIN, Circuit Judges

Opinion

Filed March 26, 1945

ALLEN, Circuit Judge. The principal question presented in this case is whether the taxpayer received in 1934 a taxable dividend paid out of earnings and profits of the Senior Investment
152 Corporation. The Commissioner determined a deficiency of $1,231,636.92, based primarily upon a distribution by the Senior Investment Corporation in 1934 of 43,400 shares of common stock of General Motors Corporation. The Tax Court held that the Senior Investment Corporation had a large operating deficit on the date of the distribution of the shares, and that no taxable dividend was received.

The material facts as stipulated and found by the Tax Court are as follows:

The tax return involved was made for 1934 as a joint return by Fred J. Fisher and his wife, Burtha M. Fisher, residents of Detroit, Michigan. In January 1934, Fisher owned all of the outstanding Class A shares of the Senior Investment Corporation, 71,573 in number. The cost to him of these shares was not less than $1,723,881.25. On January 31, 1934, without surrendering any of the Class A shares Fisher received as a distribution on the stock 43,300 shares of General Motors common stock having a value of $1,723,881.25. The Senior Investment Corporation was incorporated July 29, 1929, with 300,000 shares of no par value stock, consisting of 100,000 shares each of Class A, B, and C stock. Immediately following the incorporation, the Fishers transferred certain assets, particularly securities, to the Senior Investment Corporation. The cost to the Fishers and the July 29, 1929, fair market value of the assets transferred and the number of shares issued to them therefor by the Senior Investment Corporation are shown in the following table:

	Cost	July 29, 1929, fair market value	Number of shares issued
Fred J. Fisher	[illegible]	[illegible]	[illegible]
Burtha M. Fisher	[illegible]	[illegible]	[illegible]

The remaining 10,000 Class C shares were issued to an employee for no consideration. On December 9, 1931, the Senior Investment Corporation retired the 9,143 Class A shares held by Burtha M. Fisher.

In computing its gain or loss from the sale or other disposition of the assets received for its shares on incorporation, the Senior Investment Corporation used as a basis the fair market value of such assets on the date received. As a result, the corporation had a large operating deficit on January 31, 1934, when the General Motors Corporation shares were distributed to Fisher. The Commissioner used the transferors' cost as a basis, and thus computed, the books of the corporation showed a surplus in excess of
153 $1,723,881.25 available for distribution of dividends. Since Fisher did not receive a taxable dividend unless the Senior Investment Corporation had a surplus available for distribution of dividends, the case turns upon the question whether the corporation, in computing its gain or loss on the sale of the assets acquired by it from the Fishers in exchange for its own stock, should have used as a basis the fair market value of the assets at the time of the exchange, or the transferors' cost. The Tax Court, relying upon decisions of its own and of other courts [Cf. Commissioner v. W. S. Farish & Co., 104 Fed. (2d) 833 (C. C. A. 5); Commissioner v. F. J. Young Corp., 103 Fed. (2d) 137 (C. C. A. 3)] held that the basis used by the Senior Investment Corporation was correct and declined to sustain the deficiency.

The Commissioner contends that when a corporation acquires assets in a transaction where the transferors' gain or loss is not recognized for tax purposes, the corporation's earnings and profits for dividend purposes are determined in the same manner as its taxable gains. The transactions between the Fishers and the Senior Investment Corporation were tax free within § 112 of the Revenue Act of 1934.

The statute which governs this situation was first enacted in 1940 and its material portions are printed in the margin.[1] This

[1] Second Revenue Act of 1940, c. 757, 54 Stat. 1004.

SEC. 501. EARNINGS AND PROFITS OF CORPORATIONS.

(a) Under Internal Revenue Code. Section 115 of the Internal Revenue Code is amended by inserting at the end thereof the following new subsections:

"(l) Effect on Earnings and Profits of Gain or Loss and of Receipt of Tax Free Distributions. The gain or loss realized from the sale or other disposition (after February 28, 1913) of property by a corporation—

"(1) for the purpose of the computation of earnings and profits of the corporation, shall be determined, except as provided in paragraph (2), by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made for determining gain, except that no regard shall be had to the value of the property as of March 1, 1913; but

"(2) for the purpose of the computation of earnings and profits of the corporation for any period beginning after February 28, 1913, shall be determined by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain."

(Continued on page 109).

section in effect provides that corporate earnings and profits on the sale of assets of the corporation are to be computed in the year when recognized in the same manner as taxable gains are calculated. But the statute also provides that the amendments made by the section shall not affect the tax liability of any transferor for any year which on September 20, 1940, was pending
154 before or was theretofore determined by the Board of Tax Appeals or any court of the United States. The petition in this case was filed September 6, 1940, and therefore the proceeding is not governed by the amendments of 1940. In this respect the case is sharply differentiated from Commissioner v. Wheeler, et al., Extres., — U. S. —, decided March 26, 1945, which held valid and applicable Treasury Regulations 101, Art. 115-3, embodying the provisions of the 1940 amendment as to the determination of earnings and profits of a corporation for dividend purposes. Relying upon the cited case, the Commissioner contends that Regulation 86, Art. 115-1, a predecessor of Art. 115-3, requires reversal of the decision of the Tax Court. We think that Art. 115-1 does not govern here, for Treasury Decision No. 5024, 1940-2 Cum. Bull. 110, declares that while the rules stated in the regulations are applicable to cases which were pending before the Board of Tax Appeals on September 20, 1940, the limitation of Sec. 501 (c) affects the tax liability for the specific year or years actually so pending on or determined prior to September 20, 1940. This decision applies the saving clause of Sec. 501 (c) to cases governed by Art. 115-1. As a contemporaneous interpretation of the meaning of the regulations by those who are appointed to carry out its provisions, Treasury Decision No. 5024 has great weight and is entitled to respect. Augustus v. Commissioner, 118 Fed. (2d) 38 (C. C. A. 6), certiorari denied, 313 U. S. 585. Cf. Bowles, Admr. v. Seminole Rock & Sand Co., — U. S. —, decided June 4, 1945.

In view of the fact that the transaction involved took place on January 31, 1934, and Art. 115-1 was promulgated on February 11, 1935, Treasury Decision No. 5024 may be viewed as a limitation on its retroactive effect. Since the decision was made by the Com-

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(Continued from page 108).

Gain or loss so realized shall increase or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing net income under the law applicable to the year in which such sale or disposition was made. Where in determining the adjusted basis used in computing such realized gain or loss the adjustment to the basis differs from the adjustment proper for the purpose of determining earnings or profits, then the latter adjustment shall be used in determining the increase or decrease above provided. * * *

(b) Effective Date of Amendment. The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938.

(c) Under Prior Acts. For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this section shall be effective as if they were a part of each such Revenue Act on the date of its enactment. Nothing in this subsection shall affect the tax liability of taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals or any court of the United States.

missioner with the approval of the Secretary of the Treasury, this limitation upon the retroactivity of the regulations has a double congressional sanction, one arising from the saving clause in Sec. 501 (c), the other from the specific authority granted the Commissioner with approval of the Secretary, under Sec. 3791 (b) of the Internal Revenue Code, to limit the retroactive effect of any ruling, regulation or treasury decision relating to the internal revenue laws in precisely this way.

The decision of the Tax Court is affirmed.

155 [File endorsement omitted.]

157 In the United States Circuit Court of Appeals for the Sixth Circuit

[Title omitted.]

Petition of the Commissioner for rehearing

Filed April 7, 1945

We respectfully submit that the opinion in the above entitled case, decided March 26, 1945, is squarely in conflict with the decision of the Supreme Court in Commissioner v. Wheeler, decided March 26, 1945, not yet reported. In the Wheeler case, it was held that Article 115–3, Treasury Regulations 101, promulgated under the Revenue Act of 1938, c. 289, 52 Stat. 447, was a reasonable regulation and a valid exercise of the rule-making power. It was decided that the earnings and profits of the John H. Wheeler Company were required to be computed as provided by the Regulations, i. e., by using the transferors' basis in determining the corporate gain realized on the disposition

158 of certain assets acquired by the corporation in a transaction in which gain or loss was not recognized to the transferors. The Supreme Court based its decision on the applicability of the Regulations, which were considered decisive of the issue presented without regard to the retroactive effect of Section 501 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974. Moreover, the Supreme Court considered that Section 111 (c) of the Revenue Act of 1938, supra, (identical with Section 111 (c) of the Revenue Act of 1934, c. 277, 48 Stat. 680, involved in this case), supported the Commissioner's position, stating:

"Indeed, Congress appears to have provided for this result in the statute itself (§ 111 (c) of the 1938 Act), which declares: 'In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the

purposes of this title, shall be determined under the provisions of section 112.'" [Italics, the Court's.]

The provisions of Article 115-1, Treasury Regulations 86, promulgated under the Revenue Act of 1934, supra, applicable in the present case, are substantially similar to those of Article 115-3, Treasury Regulations 101. Accordingly, the decision of this Court to the effect that the Regulations are invalid and that their promulgation was not within the powers conferred by Congress on the Secretary of the Treasury cannot be reconciled with the decision in the Wheeler case, supra.

We certify that this petition for a rehearing is presented in good faith and not for delay.

159 We respectfully request, therefore, that the opinion handed down by this Court on March 26, 1945, be reconsidered and that the decision of the Tax Court be reversed.

Respectfully submitted.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWELL KEY.
ROBERT N. ANDERSON,
HILBERT P. ZARKY,
Special Assistants to the Attorney General.

APRIL 1945.

160 In United States Circuit Court of Appeals

Order granting rehearing

Entered May 7, 1945

This case came on to be heard upon the petition for rehearing filed by the petitioner, and the brief in opposition thereto filed by the respondents.

On consideration whereof, it is ordered that the case be assigned for argument upon the petition for rehearing at the session of court beginning May 21, 1945, and that argument be limited to the question whether this case is governed by the decision of the Supreme Court in Commissioner v. Wheeler, et al. Extrs., announced March 26, 1945. Time allowed for such argument is 30 minutes a side.

In United States Circuit Court of Appeals

Cause argued and submitted May 25, 1945

Before HICKS, ALLEN and MARTIN, JJ.

This cause is argued by Hilbert P. Zarky for Petitioner and by R. M. O'Hara for Respondents and is submitted to the court.

In United States Circuit Court of Appeals, Sixth Circuit.

Judgment

Entered June 25, 1945

This case came on to be heard upon the petition for rehearing, the briefs in opposition thereto, the record, and oral argument of counsel.

On consideration whereof, it is ordered that the opinion heretofore announced (March 26, 1945) be amended in the following particulars:

That portion on page 3, beginning with the words "in order" in line 8 and continuing through line 36, is stricken out.

The second and third paragraphs on page 4, and all of page 5, are stricken out.

The following is inserted, beginning in line 11 on page 4: In this respect the case is sharply differentiated from Commissioner v. Wheeler et al., Extrs., — U. S. —, decided March 26, 1945, which held valid and applicable Treasury Regulations 101, Art. 115-3, embodying the provisions of the 1940 amendment as to the determination of earnings and profits of a corporation for dividend purposes. Relying upon the cited case, the Commissioner contends that Regulations 86, Art. 115-1, a predecessor of Art. 115-3, requires reversal of the decision of the Tax Court. We think
161 that Art. 115-1 does not govern here, for Treasury Decision No. 5024, 1940-2 Cum. Bull. 110, declares that while the rules stated in the regulations are applicable to cases which were pending before the Board of Tax Appeals on September 20, 1940, the limitation of § 501 (c) affects the tax liability for the specific year or years actually so pending on or determined prior to September 20, 1940. This decision applies the saving clause of § 501 (c) to cases governed by Art. 115-1. As a contemporaneous interpretation of the meaning of the regulations by those who are appointed to carry out its provisions, Treasury Decision No. 5024 has great weight and is entitled to respect. Augustus v. Commissioner, 118 Fed. (2) 38 (C. C. A. 6), certiorari denied, 313 U. S. 585. Cf.

Bowles, Admr., v. Seminole Rock & Sand Co., — U. S. — decided June 4, 1945.

In view of the fact that the transaction involved took place on January 31, 1934, and Art. 115–1 was promulgated on February 11, 1935, Treasury Decision No. 5024 may be viewed as a limitation on its retroactive effect. Since the decision was made by the Commissioner with the approval of the Secretary of the Treasury, this limitation upon the retroactivity of the regulations has a double congressional sanction, one arising from the saving clause in § 501 (c), the other from the specific authority granted the Commissioner with approval of the Secretary, under § 3791 (b) of the Internal Revenue Code, to limit the retroactive effect of any ruling, regulation, or treasury decision relating to the internal-revenue laws in precisely this way.

The decision of the Tax Court is affirmed.

[Clerk's certificate to foregoing transcript omitted in printing.]

162 Supreme Court of the United States

Order allowing certiorari

Filed November 5, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy and Mr. Justice Jackson took no part in the consideration of decision of this application.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 452

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES T. FISHER, EDWARD F. FISHER, AND LEO M. BUTZEL, EXECUTORS OF THE ESTATE OF FRED J. FISHER, AND BURTHA M. FISHER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Acting Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 141–143) is unreported. The opinion of the Circuit Court of Appeals (R. 151–154) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 25, 1945 (R. 160). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the decision of the court below conflicts with the decision of this Court in *Commissioner* v. *Wheeler*, decided March 26, 1945.

STATUTES AND OTHER AUTHORITIES INVOLVED

The provisions of the statutes and other authorities involved are set forth in Appendix A, *infra*, pp. 16–24.

STATEMENT

The facts in this case were stipulated by the parties (R. 15–26, 141). Senior Investment Corporation, a Michigan corporation, was incorporated on July 29, 1929, with an authorized capital of 300,000 shares of no par value stock consisting of 100,000 shares each of Class A, B, and C stock (R. 16, 141). Taxpayer[1] and his wife were among the incorporators (R. 16). On July 29, 1929, immediately following incorporation, in exchange for the issuance of Senior Investment Corporation stock, they transferred certain se-

[1] For convenience, Fred J. Fisher will be referred to as the taxpayer, although he and his wife, Burtha M. Fisher, filed a joint return for 1934, the taxable year in controversy. Fred J. Fisher died subsequent to the filing of the petition before the Tax Court seeking a redetermination of the deficiency found by the Commissioner, and the executors of his estate were substituted as petitioners. (R. 14, 15.)

curities to the corporation (R. 17). The cost to taxpayer and his wife, and the fair market value, as of July 29, 1929, of the securities transferred, and the shares of its stock issued by Senior Investment Corporation in exchange, are as follows (R. 17–18, 142):

	Cost	July 29, 1929, fair market value	Shares of Senior Investment Corporation stock issued
Fred J. Fisher	$12,957,242.88	$42,944,427.76	71,573 Class A, 79,805 Class C,
	894,060.02	50,000,000.00	100,000 Class B,
Burtha M. Fisher	699,350.00	5,486,250.00	9,143 Class A, 10,195 Class C,

The remaining 10,000 shares of Class C stock were issued to an employee without any payment (R. 17, 142). On December 9, 1931, the Class A stock which had been issued to taxpayer's wife was retired and thereafter taxpayer held all the outstanding Class A and Class B stock (R. 19, 142).

On January 31, 1934, gain or loss from the sale or other disposition of the assets exchanged for stock on incorporation would, if computed on the basis of the transferors' cost of those assets, have resulted in Senior Investment Corporation having an adjusted surplus in excess of $1,723,881.25 available for the distribution of dividends (R. 20–25, 142). In computing its taxable income, Senior Investment Corporation had determined its federal tax liability by using the transferors' cost (R. 25): However, if gain or loss were com-

puted by using the fair market value of those assets as of the date they were exchanged for its stock, Senior Investment Corporation would have had an operating deficit as of January 31, 1934 (R. 20–25, 142).

On January 31, 1934, taxpayer, without surrendering any of his Class A stock in Senior Investment Corporation, received a distribution thereon consisting of 43,300 shares of common stock of General Motors Corporation. The General Motors shares had a value, as of that date, of $1,723,881.25 (R. 15–16, 141). Taxpayer and his wife filed a joint return for 1934 but did not include in their taxable income the amount of the above-mentioned distribution (R. 16). The Commissioner determined that the distribution constituted a dividend received by taxpayer from Senior Investment Corporation and that it should have been included in his taxable income (R. 16). Consequently, he found a deficiency in income tax of $1,231,636.92, the greatest portion of which was attributable to the failure to have included the distribution of General Motors stock in taxpayer's taxable income (R. 8–14, 141).

On September 6, 1940, taxpayer filed a petition with the Board of Tax Appeals (now the Tax Court of the United States) for a redetermination of the deficiency on the ground that the distribution constituted a return of capital which served to reduce, but which was not in excess of,

the cost basis of his Senior Investment Corporation stock (R. 3–7).

The Tax Court decided that the distribution did not constitute a taxable dividend since the corporation had a deficit in earnings and profits, it being held that the fair market value of the assets on the date of their exchange was the proper basis for computing earnings and profits (R. 141–143). The decision of the Tax Court, entered March 23, 1944, determined a deficiency of $212,716.47, which arose out of matters not here in dispute (R. 143).

On review, the Circuit Court of Appeals issued an opinion on March 26, 1945, holding that the Commissioner's regulations were invalid if construed as requiring that earnings and profits be computed on the transferors' basis (Appendix B, *infra*, pp. 25–32). On May 7, 1945, the Circuit Court of Appeals granted the Commissioner's petition for a rehearing (R. 160). On June 25, 1945, the Circuit Court of Appeals issued a decision which amended its former opinion but which adhered to its previous disposition of the case (R. 160–161).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred in deciding that the corporation here involved was not required to compute its earnings and profits in relation to the transferors' basis for certain assets acquired in

a tax-free transaction, and that the corporation did not have sufficient earnings and profits for a distribution (which it made to the taxpayer) to constitute a taxable dividend.

REASONS FOR GRANTING THE WRIT

The ultimate issue in this case is identical with that decided in *Commissioner* v. *Wheeler*, No. 354, October Term, 1944, decided March 26, 1945, not yet reported. We maintain that the decision of the Circuit Court of Appeals in the present case is in direct conflict with the *Wheeler* case.

This case and the *Wheeler* case involve the computation of corporate earnings and profits on the disposition of assets acquired in a tax-free transaction. The *Wheeler* case held that, under a substantially identical regulation to that involved here, any increment in earnings and profits is to be measured in relation to the transferor's basis for those assets (just as corporate taxable gains are measured) and that the market value of the assets when acquired by the corporation must be disregarded. The court below, however, refused to use the transferors' basis to determine the amount of earnings and profits available for the distribution of a corporate dividend in this case but, instead, relied on the market value of the transferred assets. Its decision, in effect, repudiates the *Wheeler* case and the grounds on which that decision rests.

On the same day that *Commissioner* v. *Wheeler*, *supra*, was decided, upholding the Commissioner's regulation which required that the transferor's basis be used, the court below handed down its first opinion in this case (set forth in full in Appendix B, *infra*, pp. 25–32) holding Article 115–1 of Treasury Regulations 86 (Appendix A, *infra*, pp. 20–21) invalid if construed to require the use of transferors' basis.

After granting a rehearing because of the asserted conflict with the *Wheeler* case, the court below decided that it would adhere to its original disposition of this case. Its previous opinion was withdrawn and a second opinion was rendered to justify the result reached. Withdrawing from its previous position that Article 115–1 was invalid, the court nevertheless attempted to distinguish the *Wheeler* case and refused to apply the regulation on the ground that it was rendered inoperable here by Section 501 (c) of the Second Revenue Act of 1940 and T. D. 5024 (Appendix A, *infra*, pp. 20, 21–24), since the present case was pending before the Tax Court (then the Board of Tax Appeals) on September 20, 1940. We believe that there are no material distinctions between the instant case and the *Wheeler* case, and that the decision of this Court was actually nullified by the court below.

(a) One of the reasons apparently relied on by the court below for making the pending dates

of the two cases a source of distinction,[2] and for not applying the regulatory provisions which were approved in the *Wheeler* case, is Section 501 (c) of the Second Revenue Act of 1940 (Appendix A, *infra*, p. 20) which provides:

> (c) *Under Prior Acts.*—For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this section shall be effective as if they were made a part of each such Revenue Act on the date of its enactment. Nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States.

The *Wheeler* case, however, demonstrates that the attempted distinction is without meaning. The very issue in that case was whether Section 501 (c) was valid in requiring, as the taxpayer there contended, the retroactive application of a new rule for the computation of earnings and profits. This Court, however, held that Section 501 (a) (Appendix A, *infra*, p. 18) did not enact, and that Section 501 (c) did not retroactively apply, a new rule; on the contrary, it was

[2] In the *Wheeler* case, the petition was filed with the Board of Tax Appeals on May 12, 1941 (Record in No. 354, October Term, 1944, p. 1); in the instant case, the petition was filed with the Board on September 6, 1940 (R. 3).

held that the rule contended for by the Commissioner had already been provided for by Section 111 (c) of the Revenue Act of 1938, c. 289, 52 Stat. 447, and by Article 115–3 of Treasury Regulations 101, promulgated under the Revenue Act of 1938. Accordingly, it was concluded that "There is no necessity to predicate the determination of deficiency on the 1940 amendment" (slip op. 4). In the present case, Section 111 (c) of the Revenue Act of 1934 and Article 115–1 of Treasury Regulations 86 (Appendix A, *infra*, pp. 16–17, 20–21), which are substantially identical with those involved in the *Wheeler* case, required the use of the transferors' basis; in the present case, also, there is no necessity of predicating the method of computation on the provisions of the Second Revenue Act of 1940.

Thus, whether this case was pending on September 20, 1940, is not a material distinction from the *Wheeler* case; in both cases the rule of computation applied is not based on Section 501 and nothing in Section 501 (c) is used or relied on to "affect the tax liability of any taxpayer." The tax liability here results from the provisions of the statute and regulations in effect in 1934. In refusing to give effect to those provisions, the Circuit Court of Appeals clearly contradicted a controlling decision of this Court. This negation of the *Wheeler* case is even more emphatic when it is realized that the court below, in using market

value as the basis, persisted in applying a rule which was expressly rejected by this Court and which, as this Court stated, resulted from using "as a base for tax purposes a figure that in itself had no relation to taxation" (slip op. 3).[3]

(b) The other reason relied on by the Circuit Court of Appeals for making the pending dates of the two cases a source of distinction rests on the provisions of T. D. 5024, 1940–2 Cum. Bull. 110 (Appendix A, *infra*, pp. 21–24). We submit that the Treasury Decision expressly provides that cases of this sort are to be governed by the rule applied in the *Wheeler* case. Paragraph 2 of

[3] The Tax Court had expressly interpreted Section 501 as adopting a new rule which would result in affecting tax liability and which was, therefore, prohibited by Section 501 (c) from being used in pending cases. That was the basis for its decision in this case (R. 142–143), in the related case of *Senior Investment Corp.* v. *Commissioner*, 2 T. C. 124, 139 (now pending in the Circuit Court of Appeals for the Sixth Circuit), and also in *Falkland Corp.* v. *Commissioner*, decided November 8, 1941 (1941 P-H Memorandum Decisions, par. 41,497); cf. *Estate of Wheeler* v. *Commissioner*, 1 T. C. 640, 645, *et seq.* However, the decision of this Court in the *Wheeler* case clearly demonstrated that this reasoning had been in error. Also, the Tax Court felt it necessary, in order to prevent the application of a new rule, to adhere to its previous decisions which had used market value. Since the *Wheeler* case expressly repudiated these decisions, the reasons relied on by the Tax Court for using market value in pending cases were deprived of all validity. While the Circuit Court of Appeals in this case was not explicit in its construction of Section 501 (c), it reached the same erroneous result as the Tax Court.

T. D. 5024, which construes Section 501 (c) of the Second Revenue Act of 1940, provides:

> PAR. 2. The above amendments to Regulations 103 (which regulations cover taxable years beginning after December 31, 1938) are hereby made applicable to taxable years beginning prior to January 1, 1939 (such years being covered by Regulations 101, 94, 86, 77, 74, 69, 65, 62, 45, and 33). Although under section 501 (c) the final determination by the Board of Tax Appeals or any court of the United States of the tax liability of any taxpayer for any such taxable year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States, is not affected by the enactment of section 501, *the rules stated in the regulations are applicable to such cases inasmuch as such rules are a proper interpretation of the law as it existed prior to the enactment of section 501.* The limitation in section 501 (c) has application only to such taxpayer, and in the case of such taxpayer, only with respect to the tax liability for the specific year or years actually so pending on, or so determined prior to, September 20, 1940. [Italics supplied.]

It is difficult to conceive how the italicized language could have expressed more clearly the proposition that use of the transferor's basis had always been the proper rule for the calculation of

earnings and profits and was to be applied to pending cases on account of that, and not because of the enactment of the Second Revenue Act of 1940. That was the position which was consistently adhered to by the Commissioner and which was accepted as the basis for the decision in the *Wheeler* case.

The last sentence of paragraph 2 of T. D. 5024 was construed by the court below as contradicting the preceding sentence. However, we believe that the last sentence merely states a conclusion, which had been more fully expressed in the committee reports,[4] that, if there should be an erroneous final decision in favor of a particular taxpayer in a case pending on September 6, 1940, or already decided, the finality of the decision would be limited to the particular year involved and *res judicata* would not operate to give him (or other stockholders in the same corporation) a vested right in the wrong method of computing earnings and profits for all other taxable years. Such a precautionary statement does not mean that the correct method of computation must not be applied in a case pending on September 6, 1940, and that resort must be had to an erroneous method instead. In any event, the last sentence of the Treasury Decision has no application here, for it involves Section 501 (c),

[4] S. Rep. No. 2114, 76th Cong., 3d Sess., pp. 26–27 (1940–2 Cum. Bull. 528); H. Conference Rep. No. 3002, 76th Cong., 3d Sess., pp. 61–62 (1940–2 Cum. Bull. 548).

which, as we have shown, does not affect the tax liability in this case.

The court below advanced only one explicit reason for its belief that the Commissioner intended to insulate pending cases from the application of the correct rule. It was suggested that, having first adopted the use of the transferor's basis in the regulation here applicable (Article 115–1 of Treasury Regulations 86), and having promulgated the regulation after the beginning of the taxable year 1934, the Commissioner wished to avoid a retroactive application thereof. We deny that any retroactivity is involved in this or in other cases involving the tax year 1934. In the *Wheeler* case, it was stated that "Congress appears to have provided" for the use of the transferor's basis in Section 111 (c) of the Revenue Act of 1938 (slip. op. 4). Similar provisions have appeared in all Revenue Acts beginning with Section 202 (d) of the Revenue Act of 1924, c. 234, 43 Stat. 253.[5] Moreover the regulation only clarified existing statutory language.

The assumption that the Commissioner wished to avoid a retroactive application of Article 115–1 embodies a *non-sequitur*. If a case was pending on September 20, 1940, or had previously been decided, there is no relationship

[5] See Section 202 (d) of the Revenue Act of 1926; Section 111 (d) of the Revenue Act of 1928; Section 111 (c) of the Revenue Acts of 1932, 1934, 1936, 1938 and of the Internal Revenue Code.

between that fact and the precise year in which the disputed earnings and profits arose. Thus *Falkland Corp.* v. *Commissioner,* decided November 8, 1941 (1941 P-H Memorandum Decisions Service, par. 41,497), footnote 3, *supra,* although pending on September 20, 1940, involved the tax year 1937 and retroactive application, even under the court's theory, could not have been presented in that case. Also, it would be possible for the tax year 1934 to be involved in cases filed after September 20, 1940. If the Commissioner had actually intended the result which the court relied on, and if he had possessed the authority to do so, Treasury Regulations 86 would have been amended to exempt the year 1934. Making an exception for cases pending on September 20, 1940, could scarcely have been expected to accomplish this except by the process of coincidence.

It can only be concluded that the decision in this case, and the reasons apparently relied on by the court below in support of its decision, conflict in all respects with the decision of this Court in *Commissioner* v. *Wheeler, supra.*

In failing to accept the *Wheeler* decision as controlling, the court below has so far departed from the usual course of judicial proceedings as to call for this Court's supervisory review.[6]

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[6] Unless reversed, the court below will undoubtedly adhere to its present holding in deciding the similar issue in *Senior Investment Co.* v. *Commissioner,* fn. 3, *supra.*

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

HAROLD JUDSON,
Acting Solicitor General.

SEPTEMBER 1945.

APPENDIX A

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * *

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * * * *

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the

purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * * *

(5) *Transfer to Corporation Controlled by Transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(6) *Tax-Free Exchanges Generally.*—If the property was acquired, after February 28, 1913, upon an exchange described in section 112 (b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain

or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. * * * This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

* * * * *

(8) *Property Acquired by Issuance of Stock or as Paid-In Surplus.*—If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

(B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

* * * * *

Second Revenue Act of 1940, c. 757, 54 Stat. 974:

SEC. 501. EARNINGS AND PROFITS OF CORPORATIONS.

(a) *Under Internal Revenue Code.*—Section 115 of the Internal Revenue Code is amended by inserting at the end thereof the following new subsections:

"(1) *Effect on Earnings and Profits of Gain or Loss and of Receipt of Tax-Free Distributions.*—The gain or loss realized from the sale or other disposition (after February 28, 1913) of property by a corporation—

"(1) for the purpose of the computation of earnings and profits of the corporation, shall be determined, except as provided in paragraph (2), by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain, except that no regard shall be had to the value of the property as of March 1, 1913; but

"(2) for the purpose of the computation of earnings and profits of the corporation for any period beginning after February 28, 1913, shall be determined by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain.

Gain or loss so realized shall increase or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing net income under the law applicable to the year in which such sale or disposition was made. Where in determining the adjusted basis used in computing such realized gain or loss the adjustment to the basis differs from the adjustment proper for the purpose of determining earnings or profits, then the latter adjustment shall be used in determining the increase or decrease above provided. Where a corporation receives (after February 28, 1913) a distribution from a second corporation which (under the law applicable to the year

in which the distribution was made) was not a taxable dividend to the shareholders of the second corporation, the amount of such distribution shall not increase the earnings and profits of the first corporation in the following cases:

"(1) No such increase shall be made in respect of the part of such distribution which (under such law) is directly applied in reduction of the basis of the stock in respect of which the distribution was made.

"(2) No such increase shall be made if (under such law) the distribution causes the basis of the stock in respect of which the distribution was made to be allocated between such stock and the property received. * * *"

(b) *Effective Date of Amendment.*—The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938.

(c) *Under Prior Acts.*—For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this section shall be effective as if they were a part of each such Revenue Act on the date of its enactment. Nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States. (26 U. S. C. 1940 ed., Sec. 115.)

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 115-1. *Dividends.*—The term "dividends" for the purpose of Title I (except when used in sections 203 (a) (4) and 207

(c) (1)) comprises any distribution in the ordinary course of business, even though extraordinary in amount, made by a domestic or foreign corporation to its shareholders out of its earnings or profits accumulated since February 28, 1913. Among the items entering into the computation of corporate "earnings or profits" for a particular period are all income exempted by statute, income not taxable by the Federal Government under the Constitution, as well as all items includible in gross income under section 22 (a) of the Act or corresponding provisions of prior Acts. Gains and losses within the purview of section 112, are brought into the earnings and profits account at the time and to the extent such gains and losses are recognized under that section. * * *

T. D. 5024, 1940–2 Cum. Bull. 110:

PARAGRAPH 1. By reason of the enactment of section 501 of the Second Revenue Act of 1940 (Public, No. 801, Seventy-sixth Congress, third session), approved October 8, 1940, Regulations 103 [Part 19, Title 26, Code of Federal Regulations, 1940 Sup.] are amended as follows:

* * * * *

C. The following sections are inserted immediately following section 19.115–11:

SEC. 19.115–12. *Effect on earnings and profits of gain or loss realized after February 28, 1913.*—In order to determine the effect on earnings and profits of gain or loss realized from the sale or other disposition (after February 28, 1913) of property by a corporation, section 115 (l) prescribes certain rules for (1) the computation of the total earnings and profits of the corporation, of most frequent application

in determining invested capital; and (2) the computation of earnings and profits of the corporation for any period beginning after February 28, 1913, of most frequent application in determining the source of dividend distributions. Such rules are applicable whenever under any provision of Chapter 1 or 2 it is necessary to compute either the total earnings and profits of the corporation or the earnings and profits for any period beginning after February 28, 1913. For example, since the earnings and profits accumulated after February 28, 1913, or the earnings and profits of the taxable year, are earnings and profits for a period beginning after February 28, 1913, the determination of either must be in accordance with the rules herein prescribed for the ascertainment of earnings and profits for any period beginning after February 28, 1913. Under (1) such gain or loss is determined by using the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain, but disregarding value as of March 1, 1913. Under (2) there is used such adjusted basis for determining gain, giving effect to the value as of March 1, 1913, whenever applicable. In both cases the rules are the same as those governing depreciation and depletion in computing earnings and profits (see section 19.115–3). Under both (1) and (2) the adjusted basis is subject to the limitations of the third sentence of section 115 (l) requiring the use of adjustments proper in determining earnings and profits. The proper adjustments may differ under (1) and (2) of section 115 (l) depending upon the basis to which the adjustments are to be made. If the application of (2) of the

first sentence of section 115 (l) results in a loss and if the application of (1) of such sentence to the same transaction reaches a different result, then the loss under (2) will be subject to the adjustment thereto required by section 115 (m)(2). (See section 19.115–14.)

The gain or loss so realized increases or decreases the earnings and profits to, but not beyond, the extent to which such gain or loss was *recognized* in computing net income under the law applicable to the year in which such sale or disposition was made. As used in this subsection the term "recognized" has reference to that kind of realized gain or loss which is recognized for income tax purposes by the statute applicable to the year in which the gain or loss was realized, for example, see section 112. * * *

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PAR. 2. The above amendments to Regulations 103 (which regulations cover taxable years beginning after December 31, 1938, are hereby made applicable to taxable years beginning prior to January 1, 1939 (such years being covered by Regulations 101, 94, 86, 77, 74, 69, 65, 62, 45, and 33). Although under section 501 (c) the final determination by the Board of Tax Appeals or any court of the United States of the tax liability of any taxpayer for any such taxable year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States, is not affected by the enactment of section 501, the rules stated in the regulations are applicable to such cases inasmuch as such rules are a proper interpretation of the law as it

existed prior to the enactment of section 501. The limitation in section 501 (c) has application only to such taxpayer, and in the case of such taxpayer, only with respect to the tax liability for the specific year or years actually so pending on, or so determined prior to, September 20, 1940.

APPENDIX B

Opinion, rendered March 26, 1945.

Before HICKS, ALLEN, and MARTIN, Circuit Judges.

ALLEN, Circuit Judge. The principal question presented in this case is whether the taxpayer received in 1934 a taxable dividend paid out of earnings and profits of the Senior Investment Corporation. The Commissioner determined a deficiency of $1,231,636.92, based primarily upon a distribution by the Senior Investment Corporation in 1934 of 43,400 shares of common stock of General Motors Corporation. The Tax Court held that the Senior Investment Corporation had a large operating deficit on the date of the distribution of the shares, and that no taxable dividend was received.

The material facts as stipulated and found by the Tax Court are as follows:

The tax return involved was made for 1934 as a joint return by Fred J. Fisher and his wife, Bertha M. Fisher, residents of Detroit, Michigan. In January 1934, Fisher owned all of the outstanding Class A shares of the Senior Investment Corporation, 71,573 in number. The cost to him of these shares was not less than $1,723,881.25. On January 31, 1934, without surrendering any of the Class A shares Fisher received as a distribution on the stock 43,300 shares of General Motors common stock having a value of $1,723,881.25. The Senior Investment Corporation was

incorporated July 29, 1929, with 300,000 shares of no par value stock, consisting of 100,000 shares each of Class A, B, and C stock. Immediately following the incorporation the Fishers transferred certain assets, particularly securities, to the Senior Investment Corporation. The cost to the Fishers and the July 29, 1929, fair market value of the assets transferred and the number of shares issued to them therefor by the Senior Investment Corporation are shown in the following table:

	Cost	July 29, 1929 fair market value	Number of Senior Shares Issued
Fred J. Fisher	$12,947,242.88	$42,913,427.76	71,573 Class A 79,805 Class C.
Burtha M. Fisher	894,060.62	40,000,000.00	100,000 Class B
	699,350.00	5,486,250.00	9,143 Class A. 10,195 Class C.

The remaining 10,000 Class C shares were issued to an employee for no consideration. On December 9, 1931, the Senior Investment Corporation retired the 9,143 Class A shares held by Burtha N. Fisher.

In computing its gain or loss from the sale or other disposition of the assets received for its shares on incorporation the Senior Investment Corporation used as a basis the fair market value of such assets on the date received. As a result the corporation had a large operating deficit on January 31, 1934, when the General Motors Corporation shares were distributed to Fisher. The Commissioner used the transferors' costs as a basis, and thus computed, the books of the corporation showed a surplus in excess of $1,723,-

881.25 available for distribution of dividends. Since Fisher did not receive a taxable dividend unless the Senior Investment Corporation had a surplus available for distribution of dividends, the case turns upon the question whether the corporation, in computing its gain or loss on the sale of the assets acquired by it from the Fishers in exchange for its own stock, should have used as a basis the fair market value of the assets at the time of the exchange, or the transferors' cost. The Tax Court, relying upon decisions of its own and of other courts [Cf. *Commissioner* v. *W. S. Farish & Co.*, 104 Fed. (2d) 833 (C. C. A. 5); *Commissioner* v. *F. J. Young Corp.*, 103 Fed. (2d) 137 (C. C. A. 3)], held that the basis used by the Senior Investment Corporation was correct and declined to sustain the deficiency.

The Commissioner contends that when a corporation acquires assets in a transaction where the transferors' gain or loss is not recognized for tax purposes, the corporation's earnings and profits for dividend purposes are determined in the same manner as its taxable gains. The transactions between the Fishers and the Senior Investment Corporation were tax free within § 112 of the Revenue Act of 1934. In order to sustain the contention that earnings and profits for dividend purposes in such a transaction are determined in the same way as taxable gains, the Commissioner relies upon Article 115–1 of Treasury Regulations 86, which in its material portion read as follows:

> The term "dividends" for the purpose of Title I [except when used in sections 203 (a) (4) and 207 (c) (1)] comprises any distribution in the ordinary course of busi-

> ness, even though extraordinary in amount, made by a domestic or foreign corporation to its shareholders out of its earnings or profits accumulated since February 28, 1913. Among the items entering into the computation of corporate "earnings or profits" for a particular period are all income exempted by statute, income not taxable by the Federal Government under the Constitution, as well as all items includible in gross income under section 22 (a) of the Act or corresponding provisions of prior Acts. Gains and losses within the purview of section 112, are brought into the earnings and profits account at the time and to the extent such gains and losses are recognized under that section * * *

We think the decision of the Tax Court must be affirmed not only upon the authority of the cases cited, but for the reason that Article 115–1 of the Treasury Regulations is invalid if applied to this transaction as the Commissioner contends.

The statute which governs this situation was first enacted in 1940 and its material portions are printed in the margin.[1] This section in effect pro-

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[1] Second Revenue Act of 1940, c. 757, 54 Stat. 1004.

SEC. 501. EARNINGS AND PROFITS OF CORPORATIONS.

(a) Under Internal Revenue Code, Section 115 of the Internal Revenue Code is amended by inserting at the end thereof the following new subsections:

"(l) Effect on Earnings and Profits of Gain or Loss and of Receipt of Tax-Free Distributions. The gain or loss realized from the sale or other disposition (after February 28, 1913) of property by a corporation—

"(1) for the purpose of the computation of earnings and profits of the corporation, shall be determined, except as provided in paragraph (2), by using as the adjusted basis the adjusted basis (under the law applicable to the

vides that corporate earnings and profits on the sale of assets of the corporation are to be computed in the year when recognized in the same manner as taxable gains are calculated. But the statute also provides that the amendments made by the section shall not affect the tax liability of any transferor for any year which on September

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year in which the sale or other disposition was made) for determining gain, except that no regard shall be had to the value of the property as of March 1, 1913; but

"(2) for the purpose of the computation of earnings and profits of the corporation for any period beginning after February 28, 1913, shall be determined by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain."

Gain or loss so realized shall increase or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing net income under the law applicable to the year in which such sale or disposition was made. Where in determining the adjusted basis used in computing such realized gain or loss the adjustment to the basis differs from the adjustment proper for the purpose of determining earnings or profits, then the latter adjustment shall be used in determining the increase or decrease above provided * * *.

(b) Effective Date of Amendment. The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938.

(c) Under Prior Acts. For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this section shall be effective as if they were a part of each such Revenue Act on the date of its enactment. Nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States.

20, 1940, was pending before or was theretofore determined by the Board of Tax Appeals or any court of the United States. The petition in this case was filed September 6, 1940, and therefore the proceeding is not governed by the amendments of 1940.

Article 115–1, quoted above, was promulgated under the Revenue Act of 1934, and the Commissioner contends that the basis specifically made applicable to the transactions involved here is cost in the hands of the transferor through the provision that "Gains and losses within the purview of section 112, are brought into the earnings and profits account at the time and to the extent such gains and losses are recognized under that section." While mentioned by the Tax Court, this regulation was not considered in the opinion.

Section 112, referred to in the regulation, provides that upon sale or exchange of property the entire amount of the gain or loss determined under § 111 shall be recognized. Section 111 states that the gain from the sale or other disposition of property shall be the basis of the amount realized therefrom over the adjusted basis provided in § 113 (b) for determining gain. The provision of § 113 (a) (B) is that if the property was acquired by a corporation after December 31, 1920, as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor.

Assuming, but not deciding, that Article 115–1 requires the use of cost to the transferor as the basis for calculating gain or loss, we think that

the decision of the Tax Court still must be affirmed upon the ground that the regulation, if so applied to the transaction, would not be valid. Since no statutory provision existed in 1934 covering the basis to be used in determining earnings and profits, that provision could not be supplied by administrative regulation. The regulation construed here as the Commissioner contends in effect amends the statute, for it adds a provision not in the statute itself. This cannot be done. *Morrill* v. *Jones,* 106 U. S. 466, 467; *Miller* v. *United States,* 294 U. S. 435, 439; *Allis* v. *La Budde,* 128 Fed. (2d) 838, 840 (C. C. A. 7); *Commissioner* v. *Commodore, Inc.,* 135 Fed. (2d) 89 (C. C. A. 6). The authority given the Secretary of the Treasury for promulgation of regulations is found in § 4041 of the Internal Revenue Code, which provides that regulations may be promulgated for the purpose of execution and enforcement of the revenue laws. But Article 115–1, if construed as the Commissioner contends, goes far beyond enforcement. It constitutes administrative legislation.

We see nothing in *Commissioner* v. *Sansome,* 60 Fed. (2d) 931 (C. C. A. 2) requiring a contrary conclusion. That case held that amounts conceded to be prior earnings and profits of a transferor corporation constituted earnings and profits in the hands of the transferee corporation. No question of the transfer of assets by individuals to a corporation and no question whether gains from such a transaction should be figured upon the same basis as earnings and profits were involved in that case.

Since the amendment of 1940 by express terms does not govern this case, and since Article 115-1 cannot properly be applied to the transaction, we think that the reasoning of *Dobson* v. *Commissioner*, 320 U. S. 489, 502, squarely governs. No clear-cut mistake of law appears, and the decision of the Tax Court is affirmed.

U. S. GOVERNMENT PRINTING OFFICE: 1948

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 452

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES T. FISHER, EDWARD F. FISHER, AND LEO M. BUTZEL, EXECUTORS OF THE ESTATE OF FRED J. FISHER, AND BURTHA M. FISHER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 99–101) is unreported. The opinion of the Circuit Court of Appeals (R. 107–110) is reported at 150 F. 2d 198.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 25, 1945 (R. 112–113). The petition for a writ of certiorari was filed on September 24, 1945, and was granted on November 5, 1945 (R. 113). The jurisdiction of this Court

rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the decision of the court below, in refusing to compute corporate earnings and profits in relation to the transferors' basis for assets acquired in a tax-free exchange, conflicts with the decision of this Court in *Commissioner* v. *Wheeler*, 324 U. S. 542.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved are set forth in Appendix A, *infra*, pp. 33–41. Excerpts from the pertinent Congressional Committee Reports are set forth in Appendix B, *infra*, pp. 42–52.

STATEMENT

The facts in this case were stipulated by the parties (R. 10–19, 99). Senior Investment Corporation, a Michigan corporation, was incorporated on July 29, 1929, with an authorized capital of 300,000 shares of no par value stock consisting of 100,000 shares each of Class A, B, and C stock (R. 12, 99–100). Taxpayer[1] and his wife were

[1] For convenience, Fred J. Fisher will be referred to as the taxpayer, although he and his wife, Burtha M. Fisher, filed a joint return for 1934, the taxable year in controversy. Fred J. Fisher died subsequent to the filing of the petition before the Tax Court seeking a redetermination of the deficiency found by the Commissioner, and the executors of his estate were substituted as petitioners. (R. 10.)

among the incorporators (R 12). On July 29, 1929, immediately following incorporation, in exchange for the issuance of Senior Investment Corporation stock, they transferred certain securities to the corporation (R. 12, 100). The cost to taxpayer and his wife, and the fair market value, as of July 29, 1929, of the securities transferred, and the shares of its stock issued by Senior Investment Corporation in exchange, are as follows (R. 12–13, 100):

	Cost	July 29, 1929, fair market value	Shares of Senior Investment Corporation stock issued
Fred J. Fisher	$12,957,242.88	$42,043,427.76	71,573 Class A. 79,805 Class C.
	804,060.02	40,000,000.00	100,000 Class B.
Burtha M. Fisher	699,350.00	5,486,250.00	9,143 Class A. 10,195 Class C.

The remaining 10,000 shares of Class C stock were issued to an employee without any payment (R. 12, 100). On December 9, 1931, the Class A stock which had been issued to taxpayer's wife was retired and thereafter taxpayer held all the outstanding Class A and Class B stock (R. 14, 100).

On January 31, 1934, gain or loss from the sale or other disposition of the assets exchanged for stock on incorporation would, if computed on the basis of the transferors' cost of those assets, have resulted in Senior Investment Corporation having an adjusted surplus in excess of $1,723,881.25 available for the distribution of dividends (R.

14–18, 100). In computing its taxable income, Senior Investment Corporation had determined its federal tax liability by using the transferors' cost (R. 18). However, if gain or loss were computed by using the fair market value of those assets as of the date they were exchanged for its stock, Senior Investment Corporation would have had an operating deficit as of January 31, 1934 (R. 14–18, 100).

On January 31, 1934, taxpayer, without surrendering any of his Class A stock in Senior Investment Corporation, received a distribution thereon consisting of 43,300 shares of common stock of General Motors Corporation. The General Motors shares had a value, as of that date, of $1,723,881.25 (R. 11, 100). Taxpayer and his wife filed a joint return for 1934 but did not include in their taxable income the amount of the above-mentioned distribution (R. 11). The Commissioner determined that the distribution constituted a dividend received by taxpayer from Senior Investment Corporation and that it should have been included in his taxable income (R. 11, 99). Consequently, he found a deficiency in income tax of $1,231,636.92, the greatest portion of which was attributable to the failure to have included the distribution of General Motors stock in taxpayer's taxable income (R. 6–9, 99).

On September 6, 1940, taxpayer filed a petition with the Board of Tax Appeals (now the Tax Court of the United States) for a redetermina-

tion of the deficiency on the ground that the distribution constituted a return of capital which served to reduce, but which was not in excess of, the cost basis of his Senior Investment Corporation stock (R. 3–6).

The Tax Court decided that the distribution did not constitute a taxable dividend since the corporation had a deficit in earnings and profits, it being held that the fair market value of the assets on the date of their exchange was the proper basis for computing earnings and profits (R. 99–101). The decision of the Tax Court, entered on March 23, 1944, determined a deficiency of $212,716.47, which arose out of matters not here in dispute (R. 101).

On review, the Circuit Court of Appeals issued an opinion (printed as Appendix B to our petition) on March 26, 1945, holding that the Commissioner's regulations were invalid if construed as requiring that earnings and profits be computed on the transferors' basis. On May 7, 1945, the Circuit Court of Appeals granted the Commissioner's petition for a rehearing (R. 111). On June 25, 1945, the Circuit Court of Appeals issued a decision which amended its former opinion but which adhered to its previous disposition of the case on the ground that the corporation's earnings and profits were to be computed in relation to the market value of the assets as of the date they were acquired by the corporation (R. 112–113).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred in deciding that the corporation here involved was not required to compute its earnings and profits in relation to the transferors' basis for certain assets acquired in a tax-free transaction, and that the corporation did not have sufficient earnings and profits for a distribution (which it made to the taxpayer) to constitute a taxable dividend.

SUMMARY OF ARGUMENT

The provisions of the Revenue Act of 1934 and of Treasury Regulations 86, which are applicable to this case, required the corporation here to compute its earnings and profits in relation to the transferors' basis for certain assets acquired by the corporation on its organization in a transaction in which no taxable gain had been recognized to the transferors. The corporation had sufficient earnings and profits so that a distribution which it made to the taxpayer in 1934 must be considered as a dividend and taxable to him as ordinary income. There is no necessity to resort to the Second Revenue Act of 1940 in order to determine the method by which the corporation's earnings and profits are to be computed and nothing in that Act is relied on to affect the taxpayer's tax liability. Section 501 (c) of that Act does not require that the applicable provisions of prior Acts and of the Treasury Regulations issued thereunder be disregarded in deciding cases which,

like the present, were in litigation on September 20, 1940. Section 501 (c), the legislative history of the Second Revenue Act of 1940, and the interpretation of that Act adopted by the Treasury Department all establish that earnings and profits in such cases are to be computed as required by the then existing law and demonstrate that under such law earnings and profits were to be calculated by using the transferor's basis. This Court, in *Commissioner* v. *Wheeler,* 324 U. S. 542, has confirmed the view that such was the state of the law prior to the 1940 enactment. There is not and never was any legal foundation for resorting to market value rather than the transferor's basis in cases of this kind. The court below, in using market value, arrived at an erroneous result.

ARGUMENT

THE EARNINGS AND PROFITS OF THE CORPORATION HERE INVOLVED WERE REQUIRED TO BE COMPUTED IN RELATION TO THE TRANSFERORS' BASIS FOR ASSETS RECEIVED BY THE CORPORATION IN A TAX-FREE EXCHANGE

This case, like *Commissioner* v. *Wheeler,* 324 U. S. 542, presents the question how corporate earnings and profits, available for the distribution of dividends, are to be computed when a corporation has acquired assets in a transaction in which gain realized by the transferors was not recognized for income tax purposes. In *Commissioner* v. *Wheeler, supra,* it was held that the

increment in the earnings and profits account was to be measured by the difference between the transferors' basis for the assets and the price at which they were disposed of by the corporation. In the present case, if the corporation's earnings and profits are calculated in this manner, it is not disputed that the distribution made to the taxpayer must be considered as a dividend under the provisions of Section 115 (a) and (b) of the Revenue Act of 1934 (Appendix A, *infra*, pp. 35–36), and taxable to him as ordinary income under Section 22 of that Act (*ibid.*, p. 33) (see R. 100). The only issue to be decided here is whether the corporation's earnings and profits are to be determined in the same manner as they were in the *Wheeler* case, or whether a different method of computation must be employed.

The Circuit Court of Appeals refused to apply the rule of the *Wheeler* case on the ground that the present case was pending before the Board of Tax Appeals on September 20, 1940, the date mentioned in Section 501 (c) of the Second Revenue Act of 1940 (Appendix A, *infra*, p. 38), and that the two cases were to be distinguished for that reason. We shall show that no foundation exists for drawing any distinction between the cases on this account and that the decision in the *Wheeler* case itself demonstrates that such a differentiation is lacking in significance. The Circuit Court of Appeals held that the corporation's earnings and profits were to be computed on the basis

of the market price of the assets on the date that they were acquired by the corporation in the tax-free exchange. We shall show that there is no statutory authority for the rule which was thus applied by the court below and that its decision is incompatible with that of the *Wheeler* case.

An analysis of the decision below may be prefaced with a brief historical résumé. Under the provisions of Section 202 (c) (3) of the Revenue Act of 1921, c. 136, 42 Stat. 227, and similar provisions of all subsequent Acts, Congress permitted the transfer of assets to a corporation and provided for the non-recognition of any gain realized by the transferors if, immediately after the transaction, they were in control of the corporation. It was under such a provision that the taxpayer here in 1929 transferred certain securities to the Senior Investment Corporation without being required to recognize the gain which he realized on the transaction.[2] Section 204 (a)(8) of the Revenue Act of 1924, c. 234, 43 Stat. 253, and corresponding provisions of all subsequent Acts, required a corporation, which received assets in such a tax-free exchange, to calculate its taxable income by measuring any gains realized on a disposition of the assets in relation to the basis which they had in the hands of the transferor.[3] That was the

[2] Section 112 (b) (5) of the Revenue Act of 1928, c. 852, 45 Stat. 791.

[3] The corresponding provision of the Revenue Act of 1934 is Section 113 (a) (8) (Appendix A, *infra*, p. 35).

manner in which the corporation here calculated its taxable income (R. 18).

In adopting the 1924 Act, Congress not only provided in Section 204 (a) (8) that this was the way in which the corporation was to measure its gains for the purpose of computing its own income tax liability, but also provided that gain should be recognized in this manner for all income tax purposes. Section 202 (d), whose counterpart appears in all subsequent Revenue Acts, provided:[4]

> In the case of a sale or exchange, the extent to which the gain or loss determined under this section *shall be recognized for the purposes of this title,* shall be determined under the provisions of section 203. [Italics supplied.]

Thus, Congress determined that the calculation of gain should be uniform for all income tax purposes. Since Section 201 (a) of the 1924 Act,[5] which defined a dividend in terms of a distribution from corporate earnings and profits, appeared in the same title of that Act, it is only reasonable to conclude that Congress, from the very beginning of the present statutory scheme, directly expressed its intent that a corporation's earnings and profits, resulting from a disposition of corporate assets, were to be increased in exact-

[4] The corresponding provision of the Revenue Act of 1934 is Section 111 (c) (Appendix A, *infra*, pp. 33-34).

[5] The corresponding provision of the Revenue Act of 1934 is Section 115 (a) (Appendix A, *infra*, pp. 35-36).

ly the same manner for dividend purposes as corporate gains were to be measured in determining the corporation's own income tax liability. In the *Wheeler* case, *supra,* referring to the language in Section 111 (c) of the Revenue Act of 1938, c. 289, 52 Stat. 447, identical with that of Section 202 (d) of the 1924 Act, this Court observed (324 U. S. at pp. 546–547): "Indeed, Congress appears to have provided for this result in the statute itself * * *."[6]

The rule that earnings and profits were to be computed with reference to the transferor's basis for the assets received by the corporation in a tax-free exchange was also expressly incorporated in Article 115–1, Treasury Regulations 86 (Appendix A, *infra,* pp. 38–39). That regulation, which is applicable to the present case, provides:

> Gains and losses within the purview of section 112, are brought into the earnings and profits account at the time and to the extent such gains and losses are recognized under that section.

This provision was the prototype of that which was considered in *Commissioner* v. *Wheeler, supra,* and whose validity was expressly sustained in that case.[7]

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[6] Paul, *Selected Studies in Federal Taxation* (2d Series, 1938) 193–195, was referred to in the *Wheeler* opinion in this connection.

[7] In the *Wheeler* case, Article 115–3, Treasury Regulations 101, promulgated under the Revenue Act of 1938, was applicable.

Notwithstanding the provisions of the statutes, and despite the clear command of the Regulations, the Board of Tax Appeals, in several cases decided after the initial promulgation of Regulations 86, adopted and applied a rule of its own to the effect that market value of the assets at the date of the transfer, rather than the transferor's basis, was to be used in calculating corporate earnings and profits. *W. S. Farish & Co.* v. *Commissioner,* 38 B. T. A. 150, affirmed, 104 F. 2d 833 (C. C. A. 5th); *Elmhirst* v. *Commissioner,* 41 B. T. A. 348; see also *F. J. Young Corp.* v. *Commissioner,* 35 B. T. A. 860, affirmed, 103 F. 2d 137 (C. C. A. 3d). Referring to these decisions, the Court stated in the *Wheeler* case (pp. 545–546):

> Despite these adverse decisions, however, the Commissioner persisted in applying the regulation. The question was never reviewed here. Before it was finally judicially considered, Congress enacted § 501 of the Second Revenue Act of 1940, as the committee reports show, to "clarify the law" by enacting the substance of the regulation.

By enacting Section 501 of the Second Revenue Act of 1940 (Appendix A, *infra,* pp. 36–38), Congress not only acted to "clarify the law," but indicated its approval of the consistent position maintained by the Commissioner and its disapproval of the principles which the

Board of Tax Appeals had attempted to engraft upon the law[8] by providing that the legislation should be incorporated, in the form of a retroactive amendment, in all prior Revenue Acts. Despite the clear and unmistakable manner in which Congress had upheld the Commissioner's interpretation of the law in this controversy, the Board of Tax Appeals (and the Tax Court) persisted in believing that its interpretation of prior law had always been correct and that Congress had merely adopted a new and different rule which was to be applied retroactively. That was the rationale relied on by the Tax Court when it decided the *Wheeler* case (1 T. C. 640); this reasoning, however, was proved to be erroneous by this Court's decision in that case.

While the final result which the Tax Court reached in the *Wheeler* case was correct, the above-mentioned rationale which it followed in doing so caused it to arrive at an erroneous conclusion in cases like the present. This was due to the fact that Congress had provided in Section 501 (c) of the Second Revenue Act of 1940, that the application of Section 501 (a) should not "affect the tax liability" of a taxpayer if his case was pending on September 20, 1940 (Appendix A, *infra*, p. 38). Clinging to its belief that "market price" had always been the correct rule until

[8] This is also borne out by H. Rep. No. 2894, 76th Cong., 3d Sess., p. 41 (1940-2 Cum. Bull. 496, 526-527) (Appendix B, infra, pp. 42-46), which stated that the Commissioner's interpretation "effectuates the provisions of section 112."

Congress changed matters by adopting the transferor's basis, the Board of Tax Appeals (and the Tax Court) insisted on using "market price" in cases pending on September 20, 1940, because it thought that use of the transferor's basis would result in affecting the tax liability of a taxpayer, that this could be done only by the retroactive application of the 1940 amendment, and that such a result was expressly prohibited by Section 501 (*c*).[9] The Tax Court's decision in the present case rests on this basis.[10]

The *Wheeler* case establishes that the Tax Court was mistaken in the reasons on which it relied for rejecting the Commissioner's determination in this and in similar cases. It demonstrates conclusively that Article 115–1 of Treasury Regulations 86, (promulgated under the Revenue Act of 1934), which ought to have been applied, validly requires the use of the transferor's basis, that this result had been contemplated by Congress since 1924, and that there never was any foundation in law for the adoption of market price as the criterion. We agree with the court below that in this case "the proceeding is not governed by the

[9] This was the reasoning in *Falkland Corp.* v. *Commissioner*, decided November 8, 1941 (1941 P-H B. T. A. Memorandum Decisions, par. 41,497).

[10] See R. 100–101. The Tax Court relied on the same type of explanation to dispose of a similar issue in the related case of *Senior Investment Corp.* v. *Commissioner*, 2 T. C. 124, 139, now pending in the Circuit Court of Appeals for the Sixth Circuit.

amendments of 1940" (R. 109). We disagree, however, with its conclusion (R. 109) that "the case is sharply differentiated from *Commissioner v. Wheeler*", for, although the cases were pending on different dates,[11] in both cases the tax liability rests on the statute and regulations in effect during the tax year; in neither case is it necessary to resort to the 1940 legislation to determine or "affect" the tax liability involved.

Recognizing that the decision in the *Wheeler* case rendered invalid the rationale employed by the Tax Court in this case, the taxpayer has abandoned the argument made below that the decision of the Tax Court must be affirmed on the basis of its own reasoning. And, since the Circuit Court of Appeals did not advance any explicit reasons in support of its apparent assumption that Section 501 (c) prohibited use of the transferor's basis, the taxpayer attempts to sustain the decisions below on grounds which were not expressly relied on by either of the lower courts. Thus, the taxpayer contends in his brief in opposition (pp. 14–15):

> The only meaning that can be given to subsection (c) of Section 501 is the following. The first sentence thereof makes the general rule of Section 501 (a), requiring

[11] In the *Wheeler* case, the petition was filed with the Board of Tax Appeals on May 12, 1941 (Record in No. 354, October Term, 1944, p. 4). In the present case, the petition was filed with the Board on September 6, 1940 (R. 3).

the use of transferors' cost for determining earnings and profits, applicable to 1938 and all prior years. The limitation provision in the second sentence states an exception to the general rule, and makes it plain that the rule requiring the use of transferors' cost, found in Section 501 (a), is not to affect, *or be applied in determining*, the tax liability of a taxpayer for a particular year which on September 20, 1940, was pending before, or was theretofore decided (but not finally), by the Board of Tax Appeals or any court of the United States. *Congress thereby not only rejected the rule requiring use of transferors' cost in such cases, but as to them prescribed the use of corporate cost for determining earnings and profits.* [Italics supplied.]

However, this interpretation is inconsistent with the actual provisions of the statute. Section 501 (c) actually provides:

> (c) *Under Prior Acts.*—For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this section shall be effective as if they were a part of each such Revenue Act on the date of its enactment. Nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States.

Section 501 (c) merely states that the retroactive application of the rule embodied in Section 501 (a) shall not affect the tax liability in cases like the present. But that is very different from the provision which the taxpayer would insert, namely, that the rule found in the prior provisions of the statutes and regulations must not be applied in cases pending on the critical date merely because the identical principle is also embodied in Section 501 (a). The *Wheeler* case determined that the rule requiring the use of the transferor's basis, which had always been contended for by the Commissioner, was the law prior to the 1940 amendment, that "if the regulation itself was valid and effective, the clarifying amendment of 1940 added nothing to the liability of these taxpayers", and, consequently, that "there is no necessity to predicate the determination of deficiency on the 1940 amendment" (324 U. S. at pp. 546, 547). In this case, like the *Wheeler* case, the Commissioner's method of calculating the corporation's earnings and profits was determined exclusively from the applicable statutory and regulatory provisions which were in effect prior to the 1940 legislation (R. 8–9), and there is no necessity of looking to or relying on the 1940 Act in order to ascertain that the corporation here had sufficient earnings and profits to distribute a taxable dividend to the taxpayer. The validity of the tax deficiency determined by the Commissioner cannot possibly

be contradicted by the clear language of Section 501 (c), since nothing in the 1940 enactment is being used to "affect the tax liability" of this taxpayer. As a result, we find it difficult to comprehend how it can be contended that Section 501 (c) of the Second Revenue Act of 1940 was intended to prevent the application of Section 111 (c) of the Revenue Act of 1934 and Article 115–1 of Treasury Regulations 86 promulgated thereunder.

Besides concluding that Congress not only rejected the use of the correct rule of law in the type of cases referred to in Section 501 (c), the taxpayer asserts that as to those cases, Congress "prescribed the use of corporate cost" (see quotation, *supra*, p. 16). The statute, however, can be searched in vain for any intimation that Congress intended that market value or "corporate cost", as the taxpayer terms it, was to be used in any case. Indeed, it would have been most surprising if Congress had done so, for it apparently shared [12] this Court's view that such a rule resulted from "insisting on using as a base for tax purposes a figure that in itself had no relation to taxation." *Commissioner* v. *Wheeler*, 324 U. S. at p. 546.

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[12] See fn. 8, p. 13, *supra*. The fact that Congress undertook in Section 501 (b) and (c) to incorporate in all prior Revenue Acts the principle that the transferor's basis should be used, demonstrates how completely it believed that the use of market price by the Board of Tax Appeals and the Tax Court was contrary to the intention of the previous Revenue Acts.

The legislative history of the enactment, moreover, contains not a scintilla of evidence to support the meaning which the taxpayer attempts to infuse into Section 501 (c). It demonstrates, on the contrary, that Congress intended exactly the opposite.

Section 401 of the House bill [13] (which became Section 501 of the Senate bill and of the Second Revenue Act of 1940) was, without exception, applicable to the computation of earnings and profits under the Internal Revenue Code and under all prior Revenue Acts. As introduced by the Senate Finance Committee, and as passed by the Senate, the following was added to Section 501 (c):

> Nothing in this subsection shall affect the tax liability of any taxpayer for any year now pending before, or heretofore determined by, the Board of Tax Appeals, or any court of the United States.

In explaining this provision, the Senate Finance Committee stated (S. Rep. No. 2114, 76th Cong., 3d Sess., pp. 26–27 (1940–2 Cum. Bull. 528, 547–548)) (Appendix B, *infra*, p. 51):

> The last sentence of the subsection provides that only the actual tax liability of a shareholder taxpayer for a particular year which is now pending before, or heretofore determined by, the Board of Tax Appeals or any court of the United States, shall re-

[13] H. R. 10413, 76th Cong., 3d Sess.

> main unaffected by the provisions of section 501. These cases now actually in litigation are left to be determined as the Board or the court may see fit. The result is that the decision in each of these cases will merely determine the tax liability for the particular year of the particular taxpayer, but for every other purpose the determination of the earnings and profits, and of all matters dependent upon such determination, the provisions of section 501 govern. Section 501 will therefore control for all purposes as respects the corporation, and as respects the shareholder in litigation for every purpose except that the tax liability for the particular year, as finally determined by the Board or the court, will remain undisturbed.

In conference, the language was slightly changed to establish the date of September 20, 1940, as the date on which a case, to bring it within the provision, must have been pending or determined.[14] The Conference Report stated (H. Conference Rep. No. 3002, 76th Cong., 3d Sess., pp. 61–62 (1940–2 Cum. Bull. 548, 564) (Appendix B, *infra*, p. 52)):

> The House bill and Senate amendment provided that, in order to effect a uniform rule for all prior years, the stated rules are made applicable to prior Acts, but the Senate amendment added a provision provid-

[14] The bill was passed by the Senate on September 19, 1940, 86 Cong. Rec. 12352.

> ing that such rules should not affect the tax liability of any taxpayer for any year now pending before, or heretofore determined by, the Board of Tax Appeals, or any court of the United States. The tax liability may be that of the corporation the earnings or profits of which are being determined, or the tax liability of a shareholder of such corporation, or of some other taxpayer. *These tax liabilities are left to be determined according to such decisions as the Board or courts may make under existing law.* As to all matters except such tax liabilities, such stated rules are applicable, and res judicata will not be applicable. The House recedes with an amendment providing that the exception added by the Senate amendment relative to pending or decided cases shall apply only if the tax liability in question was pending before the Board of Tax Appeals or any court of the United States on September 20, 1940, or was determined prior to such date by the Board of Tax Appeals or any court of the United States. [Italics supplied.]

Thus, far from creating a new rule for computing earnings and profits in pending cases, Congress clearly intended that those cases would be determined under "existing law." The *Wheeler* case demonstrates that "existing law" required the use of the transferor's basis and, as we have previously shown (pp. 10–11, 12–13, 14, 18, *supra*), Congress also believed that "existing law"

already embodied that principle. If the 1940 enactment has any bearing on this case whatever, it only serves to emphasize the proposition that this case must be decided in the same way as it would have been determined prior to the 1940 legislation and that the corporation's earnings and profits are to be calculated in the manner contended for by the Commissioner.

The taxpayer will urge, apparently, that by "existing law" Congress was referring to the decisions of the Board of Tax Appeals and the lower courts, decisions which were repudiated in the *Wheeler* case. Thus, it is argued by the taxpayer (brief in opposition, p. 15):

> The reason for the exception is plain. Congress was aware of the fact that the Board of Tax Appeals and the Federal Courts had uniformly held theretofore that the proper method for determining earnings and profits was by reference to corporate cost (H. R. Rept. 2894; 76th Cong.; 3rd Sess.; pp. 41, 42). In the light of that knowledge Congress was merely providing against the unfair and inequitable tax consequences which might otherwise result for those taxpayers who had consummated transactions in reliance on the uniform interpretation found in the earlier Board and Court decisions.

But, as seen from the Committee Reports, since Congress believed that the Commissioner, not the Board of Tax Appeals, had correctly interpreted prior law, it would have been most inept for

Congress to have described these decisions as "existing law".

Moreover, the taxpayer, as seen from the above quotation, asserts that taxpayers had consummated transactions in reliance on the decisions of the Board of Tax Appeals.[15] Actually, no such reliance could have taken place in this case since the corporate distribution here occurred on January 31, 1934, and the first decision of the Board of Tax Appeals ruling that earnings and profits in such a situation were to be computed on the basis of market value was announced on July 22, 1938.[16] And, since the principle that the transferor's basis should be used was expressly set forth as early as February 11, 1935, when Treasury Regulations 86 were promulgated, it is difficult to see how other taxpayers could have validly relied on the opposite rule which was later

[15] Before the Circuit Court of Appeals, the taxpayer argued that the transaction in this case was actually consummated in reliance on the rulings of the Board of Tax Appeals. As is shown, such reliance was an impossibility.

[16] *W. S. Farish & Co.* v. *Commissioner*, 38 B. T. A. 150, affirmed 104 F. 2d 833 (C. C. A. 5th). In *Freshman* v. *Commissioner*, 33 B. T. A. 394, decided November 8, 1935, the Board had held that corporate earnings and profits were augmented by a transaction in which the corporation disposed of assets but in which no gain was recognizable to it for tax purposes. See also *F. J. Young Corp.* v. *Commissioner*, 35 B. T. A. 860, affirmed, 103 F. 2d 137 (C. C. A. 3d). The decisions in these situations were also contrary to the Commissioner's regulations and the view expressed in the Second Revenue Act of 1940.

adopted by the Board of Tax Appeals, especially since the Commissioner refused to acquiesce in those decisions and, instead, "persisted in applying the regulation". *Commissioner* v. *Wheeler*, 324 U. S. at p. 546. Under such circumstances it seems most improbable that Congress was concerned with taxpayers who deliberately chose to ignore the Commissioner's regulation. Those taxpayers who may have hoped to find comfort in the contrary decisions of the Board of Tax Appeals could scarcely have placed much reliance on an interpretation of law which was as actively disputed as this was.

The taxpayer argues that the Commissioner's position respecting the meaning of Section 501 (c), if adopted, would make Congress "guilty" of an "absurd legislative practice" (Brief in opposition, p. 13). This argument overlooks the fact that enlightened hindsight is scarcely a test of the wisdom of prudent forethought. The legislation was adopted, as was pointed out in the *Wheeler* case (324 U. S. at p. 546), before the question "was finally judicially considered". While Congress and the Commissioner both believed that Section 501 (a) merely embodied, in specific language, a set of rules which already was the law under previous Revenue Acts and Regulations, there could be no absolute guarantee that this view would prevail when the question was finally considered judicially. Viewed in the light of what was known in 1940 before

the *Wheeler* decision, Section 501 (c) was sensible legislative forethought. Congress believed that it was restating existing law, but recognized that this view might be judicially rejected. It was willing to enact that rule into all prior Revenue Acts to be applicable to all future cases where the earnings and profits of prior years might be involved. It did not believe it desirable to extend the express enactment to cases which were already in litigation. If a final judgment had already been entered in a case, it probably would not have been affected by the legislation anyway, but Section 501 (c), out of legislative caution, provided that the tax liability involved in cases already decided should not be affected by the enactment. If a case was already in litigation, but a final judgment had not yet been entered, the courts were left free to decide the case according to existing law without resorting to Section 501 (a) to affect the tax liability involved. Since Congress thought that existing law had merely been restated, it must have believed that such cases would be decided in the same way as future cases would be determined under the legislation. However, if its view of prior law should prove erroneous, Congress intended that the courts should be free to apply a different principle in those cases, unaffected by the rules set forth in Section 501 (a).

We believe that this is the only explanation of Section 501 (c) which is consistent with the legis-

lative history of the Section and with the actual language enacted. We further believe that there is absolutely nothing which supports the taxpayer's view that Congress isolated a few pending cases and directed the courts to apply in those cases a rule of law which Congress believed to be erroneous and to be contrary to the intention of all previous enactments.

The only explanation in the opinion below for the result reached by the Circuit Court of Appeals rests on the language of T. D. 5024, 1940-2 Cum. Bull. 110 (Appendix A, *infra*, pp. 39–41), and its interpretation of Section 501 (c) of the Second Revenue Act of 1940. The Treasury Decision, however, we believe demonstrates the error of the decision below. Paragraph 1 of the Treasury Decision amended previous Regulations to provide in greater detail how earnings and profits should be determined; paragraph 2 provided:

> The above amendments to Regulations 103 (which regulations cover taxable years beginning after December 31, 1938) are hereby made applicable to taxable years beginning prior to January 1, 1939 (such years being covered by Regulations 101, 94, 86, 77, 74, 69, 65, 62, 45, and 33). Although under section 501 (c) the final determination by the Board of Tax Appeals or any court of the United States of the tax liability of any taxpayer for any such taxable year which, on September 20, 1940, was pending before, or was theretofore deter-

> mined by, the Board of Tax Appeals, or any court of the United States, is not affected by the enactment of section 501, *the rules stated in the regulations are applicable to such cases inasmuch as such rules are a proper interpretation of the law as it existed prior to the enactment of section 501.* The limitation in section 501 (c) has application only to such taxpayer, and in the case of such taxpayer, only with respect to the tax liability for the specific year or years actually so pending on, or so determined prior to, September 20, 1940. [Italics supplied.]

Since it is expressly provided that the rules stated (which require the use of the transferor's basis) are applicable to pending cases because those rules embody a proper interpretation of prior law, it is difficult to comprehend how the Treasury Decision could possibly be construed to mean that those rules should not be applied to pending cases and could be interpreted to authorize the application to those cases of a principle which embodied an incorrect interpretation of prior law.

It is clear that the Treasury Decision is in harmony with the intention of Congress that pending cases should be decided under existing law and with its view that prior law already required the use of the transferor's basis. The court below, however, thought (R. 109) that the last sentence of T. D. 5024 showed an intention to

prevent the application of the "rules stated in the regultaions" to cases pending on September 20, 1940." We submit that the last sentence, even when read literally, does not convey such a meaning and that it could not have been intended to contradict the plain and explicit statement embodied in the preceding sentence. Moreover, when the last sentence is examined in the light of the legislative history, it is apparent that the court below erred in attempting to read an exclusion therein which would exempt the present case from the uniform rule.

As we have shown, Congress enacted the rules set forth in Section 501 (a) to be applicable to all future cases, regardless of the tax year involved. Final judgments in cases already decided were left undisturbed and pending cases were left to be determined according to existing law. Various problems of *res judicata* were likely to arise in relation to the cases in which there already was a final judgment and which had been decided on

[11] The court apparently concluded that the provisions of Article 115–1 of Treasury Regulations 86, as they stood prior to the promulgation of T. D. 5024, were not applicable to this case because of T. D. 5024, and then proceeded to disregard the requirement that the rules stated in paragraph 1 thereof were to be applied to pending cases. Regardless of whether Article 115–1 of Treasury Regulations 86 is applied to this case in the form in which it was originally promulgated, or in the manner in which it was amended by T. D. 5024, the corporation's earnings and profits were required to be computed by using the transferor's basis and the decision below is erroneous in refusing to follow that principle.

erroneous grounds. The Committee Reports make it entirely clear that Congress intended that the judgment entered should only determine the tax liability of the particular taxpayer for the particular tax year involved in the litigation, and that the same taxpayer's tax liability for all other years and the tax liability of all other taxpayers for all tax years should be determined under Section 501 (a) and that *res judicata* should not apply. Similar problems would also have arisen if Congress had been wrong in its view of existing law and if pending cases should have been finally decided according to principles contrary to those embodied in Section 501 (a). If that had been the case, the same application of Section 501 (a) was intended for all taxpayers and tax years except the liability actually determined in the litigation. Since, as we believe, the *Wheeler* case demonstrates that Congress was correct in its view of existing law and that pending cases were to be determined according to the same rules which were embodied in existing law, no problem of *res judicata* will arise with respect to those cases, and the Congressional concern could have been limited to cases in which there was a previous final judgment.

Returning to the ultimate sentence of T. D. 5024, it is clear that it paraphrases the language of the Committee Reports and embodies the Congressional intent with respect to the application of Section 501 (a) to all taxpayers and all tax

years except as regards the particular tax liability of a taxpayer finally judicially determined in a case which was in litigation on or prior to the critical date. Moreover, this sentence involves Section 501 (c), which, as we have shown, does not affect the tax liability in this case.

The court below reasoned as follows (R. 109–110): The transaction here took place prior to the actual date on which Treasury Regulations 86 were promulgated, the application of the Regulations to this case would have been retroactive, the Commissioner has authority to prevent the retroactive application of Treasury Regulations, therefore T. D. 5024 is a limitation on the retroactive effect of Treasury Regulations 86 which finds sanction in the Commissioner's own authority and in the "saving clause in Section 501 (c)". There, however, is no warrant for the assumption that retroactivity is involved in this or any other case for, as pointed out in the *Wheeler* case (324 U. S. at pp. 546–547), Congress itself provided for the use of the transferor's basis in the statutory scheme (beginning in 1924) before the rule was first embodied in the Treasury Regulations. Even if that had not been so, despite the fact that the transaction here took place in the taxable year prior to the actual promulgation of Article 115–1 of Treasury Regulations 86, no ret-

roactivity calling for relief would be presented.[18] Revenue Acts have traditionally been enacted after the commencement of the taxable year to which they apply (see *Welch* v. *Henry*, 305 U. S. 134, 148–149, and cases cited) and the Treasury Regulations promulgated thereunder must, of necessity, be approved at a still later time. Such a gap in time does not require that an exception be made for prior transactions which occurred within the taxable year. Moreover, as previously pointed out, there is nothing in Section 501 (c) of the Second Revenue Act of 1940, or in its legislative history, to support the assumption that Congress intended an exception to be made for pending cases or conferred any discretionary authority on the Commissioner to provide for any.

Even if there were any merit in the assumption that retroactivity might be involved in some cases, it is clear that neither Section 501 (c) nor T. D. 5024 was designed to insulate this or any other case from the application of the correct rule of law. If a case was pending on September 20, 1940, or had previously been decided, there is no relationship between that fact and the precise year in which the disputed earnings and profits arose. Thus, *Falkland Corp.* v. *Commissioner, supra,* fn. 9, p. 14, although pending on September 20, 1940, involved the tax year 1937 and retroactive application, even under the theory of the court

[18] The Revenue Act of 1934 was enacted on May 10, 1934, and Treasury Regulations 86 were promulgated thereunder on February 11, 1935.

below, could not have been present in that case. Also, it would be possible for the tax year 1934 to be involved in cases filed after September 20, 1940. If the Commissioner had actually intended the result which the court relied on, and if he had possessed the authority to do so, Treasury Regulations 86 might have been amended to exempt transactions consummated prior to the date that the regulations were actually approved. Making an exception for cases pending on September 20, 1940, could scarcely have been expected to accomplish this except by the process of coincidence.

We submit that there are no valid reasons to support the decision below and that *Commissioner* v. *Wheeler, supra,* proves that the Commissioner's determination in this case is correct in all respects.

CONCLUSION

The judgment of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

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APPENDIX A

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * * * *

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the pur-

poses of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * * *

(5) *Transfer to Corporation Controlled by Transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * *

(6) *Tax-free exchanges generally.*—If the property was acquired, after February 28, 1913, upon an exchange described in section 112 (b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or de-

creased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. * * * This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

* * * * *

(8) *Property acquired by issuance of stock or as paid-in surplus.*—If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

(B) as paid-in surplus or as a contribution to capital,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

* * * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend.*—The term "dividend" when used in this title (except in section 203 (a) (4) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money

or in other property, out of its earnings or profits accumulated after February 28, 1913.

(b) *Source of Distributions.*—For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913, may be distributed exempt from tax, after the earnings and profits accumulated after February 28, 1913, have been distributed, but any such tax-free distribution shall be applied against and reduce the adjusted basis of the stock provided in section 113.

* * * * *

Second Revenue Act of 1940, c. 757, 54 Stat. 974:

SEC. 501. EARNINGS AND PROFITS OF CORPORATIONS.

(a) *Under Internal Revenue Code.*—Section 115 of the Internal Revenue Code is amended by inserting at the end thereof the following new subsections:

"(l) *Effect on Earnings and Profits of Gain or Loss and of Receipt of Tax-Free Distributions.*—The gain or loss realized from the sale or other disposition (after February 28, 1913) of property by a corporation—

"(1) for the purpose of the computation of earnings and profits of the corporation, shall be determined, except as provided in paragraph (2), by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determin-

ing gain, except that no regard shall be had to the value of the property as of March 1, 1913; but

"(2) for the purpose of the computation of earnings and profits of the corporation for any period beginning after February 28, 1913, shall be determined by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain.

Gain or loss so realized shall increase or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing net income under the law applicable to the year in which such sale or disposition was made. Where in determining the adjusted basis used in computing such realized gain or loss the adjustment to the basis differs from the adjustment proper for the purpose of determining earnings or profits, then the latter adjustment shall be used in determining the increase or decrease above provided. Where a corporation receives (after February 28, 1913) a distribution from a second corporation which (under the law applicable to the year in which the distribution was made) was not a taxable dividend to the shareholders of the second corporation, the amount of such distribution shall not increase the earnings and profits of the first corporation in the following cases:

"(1) No such increase shall be made in respect of the part of such distribution which (under such law) is directly applied in reduction of the basis of the stock in respect of which the distribution was made.

"(2) No such increase shall be made if (under such law) the distribution causes the

basis of the stock in respect of which the distribution was made to be allocated between such stock and the property received. * * *"

(b) *Effective Date of Amendment.*—The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938.

(c) *Under Prior Acts.*—For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this section shall be effective as if they were a part of each such Revenue Act on the date of its enactment. Nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States. (26 U. S. C. 115.)

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

Art. 115–1. *Dividends.*—The term "dividends" for the purpose of Title I (except when used in sections 203 (a) (4) and 207 (c) (1)) comprises any distribution in the ordinary course of business, even though extraordinary in amount, made by a domestic or foreign corporation to its shareholders out of its earnings or profits accumulated since February 28, 1913. Among the items entering into the computation of corporate "earnings or profits" for a particular period are all income exempted by statute, income not taxable by the Federal Government under the Constitution, as well as all items includible in

gross income under section 22 (a) of the Act or corresponding provisions of prior Acts. Gains and losses within the purview of section 112, are brought into the earnings and profits account at the time and to the extent such gains and losses are recognized under that section. * * *

T. D. 5024, 1940–2 Cum. Bull. 110:

Paragraph 1. By reason of the enactment of section 501 of the Second Revenue Act of 1940 (Public, No. 801, Seventy-sixth Congress, third session), approved October 8, 1940, Regulations 103 [Part 19, Title 26, Code of Federal Regulations, 1940 Sup.] are amended as follows:

* * * * *

C. The following sections are inserted immediately following section 19.115–11:

Sec. 19.115–12. *Effect on earnings and profits of gain or loss realized after February 28, 1913.*—In order to determine the effect on earnings and profits of gain or loss realized from the sale or other disposition (after February 28, 1913) of property by a corporation, section 115 (l) prescribes certain rules for (1) the computation of the total earnings and profits of the corporation, of most frequent application in determining invested capital; and (2) the computation of earnings and profits of the corporation for any period beginning after February 28, 1913, of most frequent application in determining the source of dividend distributions. Such rules are applicable whenever under any provision of Chapter 1 or 2 it is necessary to compute either the total earnings and profits of the corporation or the earnings and profits for any period beginning after February 28, 1913. For example, since the earnings and

profits accumulated after February 28, 1913, or the earnings and profits of the taxable year, are earnings and profits for a period beginning after February 28, 1913, the determination of either must be in accordance with the rules herein prescribed for the ascertainment of earnings and profits for any period beginning after February 28, 1913. Under (1) such gain or loss is determined by using the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain, but disregarding value as of March 1, 1913. Under (2) there is used such adjusted basis for determining gain, giving effect to the value as of March 1, 1913, whenever applicable. In both cases the rules are the same as those governing depreciation and depletion in computing earnings and profits (see section 19.115–3). Under both (1) and (2) the adjusted basis is subject to the limitations of the third sentence of section 115 (l) requiring the use of adjustments proper in determining earnings and profits. The proper adjustments may differ under (1) and (2) of section 115 (l) depending upon the basis to which the adjustments are to be made. If the application of (2) of the first sentence of section 115 (l) results in a loss and if the application of (1) of such sentence to the same transaction reaches a different result, then the loss under (2) will be subject to the adjustment thereto required by section 115 (m) (2). (See section 19.115–14.)

The gain or loss so realized increases or decreases the earnings and profits to, but not beyond, the extent to which such gain or loss was *recognized* in computing net in-

come under the law applicable to the year in which such sale or disposition was made. As used in this subsection the term "recognized" has reference to that kind of realized gain or loss which is recognized for income tax purposes by the statute applicable to the year in which the gain or loss was realized, for example, see section 112. * * *

* * * * *

Par. 2. The above amendments to Regulations 103 (which regulations cover taxable years beginning after December 31, 1938, are hereby made applicable to taxable years beginning prior to January 1, 1939 (such years being covered by Regulations 101, 94, 86, 77, 74, 69, 65, 62, 45, and 33). Although under section 501 (c) the final determination by the Board of Tax Appeals or any court of the United States of the tax liability of any taxpayer for any such taxable year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States, is not affected by the enactment of section 501, the rules stated in the regulations are applicable to such cases inasmuch as such rules are a proper interpretation of the law as it existed prior to the enactment of section 501. The limitation in section 501 (c) has application only to such taxpayer, and in the case of such taxpayer, only with respect to the tax liability for the specific year or years actually so pending on, or so determined prior to, September 20, 1940.

APPENDIX B

H. Rep. No. 2894, 76th Cong., 3d Sess., pp. 41–43 (1940–2 Cum. Bull. 496, 526–527):

TITLE IV

SECTION 401. EARNINGS AND PROFITS OF CORPORATIONS

The purpose of this amendment is to clarify the law with respect to what constitues earnings and profits of a corporation. This is important not only for the purpose of determining whether distributions are taxable dividends but also in determining equity invested capital for excess-profits-tax purposes.

Section 401 of the bill inserts subsection (l) in section 115 of the Internal Revenue Code and correspondingly amends prior Revenue Acts. The rule, applied by the Treasury under existing law, is that while gains or losses which are not recognized by reason of the provisions of section 112 neither increase nor diminish the earnings or profits, the earnings or profits are increased or diminished by the entire amount of the recognized gain or loss, computed in accordance with the provisions of sections 111, 112, and 113. Together with the provisions of section 115 (h) of the Internal Revenue Code, and the principles established in *Commissioner* v. *Sansome* (60 F. (2d) 931) and following decisions, the rule effectuates the provisions of section 112. While taxpayers generally have concurred in the

rule applied by the Treasury, the Board of Tax Appeals and some of the courts have not agreed but have followed the theory that gain or loss, even though not recognized in computing net income, nevertheless affects earnings and profits. For example, on January 1, 1930, the X corporation owned stock in the Y corporation which it had acquired in 1929 in a transaction wherein no gain or loss was recognized. The adjusted basis to the X corporation of the property exchanged by it for the stock in the Y corporation was $100. The fair market value of the stock in the Y corporation received by the X corporation was $1,000. On April 9, 1930, the X corporation declared a cash dividend of $900 and, except for the possible effect of the transaction in 1929, had no accumulated earnings or profits as of that date. Under the interpretation of the Board and some of the courts, the excess of the fair market value of the stock of the Y corporation over the basis, $900, would represent earnings or profits, and the cash distribution would be a taxable dividend (*Commissioner* v. *F. J. Young Corporation*, 103 F. (2d), 137). Under the proposed legislation and Treasury practice, the $900 would not represent earnings or profits, and the cash distribution would not be a taxable dividend. The need for certainty, not only with respect to the determination of when dividends are taxable but also in the computation of the excess profits tax credit, makes it desirable to clarify existing law.

Provision is made for cases in which the adjustment to the basis prescribed by section 113 is different from the adjustment to such basis proper for the purpose of determining earnings or profits. Thus,

section 113 (b) (1) (B) requires adjustment for depletion, to the extent allowed (but not less than the amount allowable). Since the only depletion deductions to be considered in the computation of earnings or profits are those based on (1) the cost or other basis prescribed by section 113, if the depletable asset was acquired subsequent to February 28, 1913, or (2) the basis prescribed by section 113, or March 1, 1913, value, whichever is higher, if the depletable asset was acquired prior to March 1, 1913, the adjustment to the basis in such a case is of such depletion deductions, and not "depletion, to the extent allowed (but not less than the amount allowable.)"

Certain tax-free distributions when received have uniformly been treated by the Treasury as not increasing the earnings or profits of the distributee for the period after February 28, 1913, of the distributee. Thus, distributions out of earnings or profits accumulated prior to March 1, 1913, or out of increase in value of property accrued prior to March 1, 1913, or otherwise than out of earnings or profits accumulated since 1913 or the earnings or profits of the taxable year, have, to the extent to which they do not exceed the adjusted basis of the stock in respect of which the distribution was made, been applied in reduction of the basis of such stock, with the result that earnings or profits are increased, upon the sale of such stock, by the entire amount of the recognized gain computed upon the basis so reduced. Tax-free distributions in stock or in rights, whether not constituting income within the meaning of the sixteenth amendment or exempt to the distributee under section 115 (f) of the Rev-

enue Act of 1934 or a corresponding provision of a prior revenue act, and tax-free distributions of stock or securities in a corporation a party to a reorganization, have consistently been treated by the Treasury as not resulting upon receipt in an increase in earnings or profits, but as causing the basis of the stock in respect of which the distribution was made to be allocated between such stock and the stock securities received, with the result that earnings or profits are increased, upon the sale of such stock or property, by the entire amount of the recognized gain computed upon the basis so determined by allocation. In order that the confusion which occasioned the enactment of section 214 (a) of the Revenue Act of 1939 may not reappear in the computation of earnings or profits, section 401 explicitly states the rules heretofore applied by the Treasury.

It should be noted that the provisions of section 401 are applicable only in determining the earnings or profits for periods beginning after February 28, 1913. In the case of a corporation organized before March 1, 1913, its entire accumulated earning or profits as of any date after February 28, 1913, consists of its earnings or profits accumulated after February 28, 1913, its earnings or profits accumulated prior to March 1, 1913, and its increase in value of property accrued prior to March 1, 1913, which has been after February 28, 1913, realized by a sale, or has otherwise been brought into account in computing its earnings or profits accumulated after February 28, 1913. With respect to earnings or profits accumulated after February 28, 1913, section 401 does not purport to pre-

scribe rules for anything other than certain exceptional cases, namely, the nonrecognition provisions of section 112, use of value as of March 1, 1913, as the basis for determining gain or loss, and depreciation and depletion, and tax-free distributions which either are applied in reduction of the basis or cause the basis to be allocated.

While prescribing rules for certain cases (which apply not only in determining earnings or profits for periods beginning after February 28, 1913, but also, to the extent to which such earnings are a factor, in determining the entire accumulated earnings or profits of a corporation), section 401 contemplates that consistently with these rules the computation shall be made conformably to the best accounting practice.

S. Rep. No. 2114, 76th Cong., 3d Sess., pp. 22–27 (1940–2 Cum. Bull. 528, 545–548):

TITLE V (TITLE IV OF THE HOUSE BILL). AMENDMENTS TO THE INTERNAL REVENUE CODE

SECTION 501. EARNINGS AND PROFITS OF CORPORATIONS.

The committee amendment rearranges section 401 of the House bill but otherwise makes no substantial change. Three new subsections are added to section 115 of the Internal Revenue Code relating to distributions by corporations. Subsection (l) defines earnings and profits of a corporation as the sum of (1) its earnings and profits accumulated after February 28, 1913, (2) its earnings and profits accumulated before March 1, 1913, plus (3) the increase (to the extent provided in subsection

(n)) in value of its property accrued before March 1, 1913, but realized on or after such date.

Subsection (m) prescribes rules for the computation of earnings and profits accumulated after February 28, 1913, and earnings and profits of the taxable year or other period after February 28, 1913. It deals with the following matters:

1. The basis upon which gain of loss, for the purposes of determining such earnings and profits, is to be computed.

2. The adjustments to be made to such basis in such computation.

3. The effect upon such earnings and profits of the application of the nonrecognition provisions of law to the gain or loss so computed.

4. The effect upon such earnings and profits of the distributions from another corporation if such distributions actually reduce the basis of the stock in respect of which the distribution is made, or cause such basis to be allocated.

The subsection provides that the gain or loss realized from the sale or other disposition (after February 28, 1913) of property shall, for the purpose of computing the earnings and profits (for any period beginning after February 28, 1913), be determined by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain. For example, stock in the X corporation was acquired by the Y corporation prior to March 1, 1913, at a cost of $90, its March 1, 1913, value was $120, and in 1939 it was sold for $100. The basis (under the law applicable to the year 1939) for determin-

ing gain is the cost or March 1, 1913, value, whichever is higher. As the Y corporation received $100 for the stock of the X corporation, and its value on March 1, 1913, $120 exceeded its cost, $90 (assuming that there are no adjustments to be made to the basis), the Y corporation realized a loss under the provisions of this subsection of $20. If such a loss is recognized under section 112, the decrease in the earnings and profits accumulated by the Y corporation after February 28, 1913, as the result of this transaction in 1939 was $20 notwithstanding provisions of the code to the effect that no deduction was allowable in computing net income.

The subsection also provides that the realized gain or loss shall increase or decrease the earnings and profits (for any period beginning after February 28, 1913) to, but not beyond, the extent to which such a realized gain or loss was recognized in computing net income under the law applicable to the year in which such sale or disposition was made. This provision relates to gains or losses which are recognized, pursuant to the provisions of law, for instance, by reason of the provisions of section 112 of the Internal Revenue Code. It does not relate to losses disallowed or not taken into account such as those under section 24 (b), section 118, and section 117 of the code. For example, on January 1, 1939, the X corporation owned stock in the Y corporation which it had acquired in 1938 in an exchange transaction in which no gain or loss was recognized. The adjusted basis to the X corporation of the property exchanged by it for the stock in the Y corporation was $100. The fair market value

of the stock in the Y corporation when received by the X corporation was $1,000. On April 9, 1939, the X corporation declared a cash dividend of $900 and, except for the possible effect of the transaction in 1938, had no accumulated earnings or profits. The excess of the fair market value of the stock of the Y corporation over the basis, $900, was not recognized gain under the provisions of section 112 of the Revenue Act of 1938. Accordingly, its earnings and profits are not increased by $900 and the distribution was not out of earnings and profits.

The subsection applies regardless of the form taken by the sale or other disposition resulting in the accumulation of earnings and profits. For example, suppose that oil property which X had acquired in 1922 at a cost of $28,000 was transferred to a corporation in 1924 in exchange for all of its capital stock; that the fair market value of the stock and of the property as of the date of the transfer was $247,000; and that the corporation, after 3 years' operations, effected in 1927 a cash distribution to X in the amount of $165,000. In determining the extent to which the earnings and profits of the corporation available for dividend distributions have been increased as the result of production and sale of oil, it is intended that depletion should be taken into account computed upon the basis of $28,000 established in the nontaxable exchange in 1924 regardless of the fair market value of the property or the stock issued in exchange therefor.

The subsection further provides that where a corporation receives (after February 28, 1913) a distribution from a sec-

ond corporation which (under the law applicable to the year in which the distribution is made) was not a taxable dividend to the shareholders of the second corporation, the amount of such distribution shall not increase the earnings and profits (for any period beginning after February 28, 1913) of the first corporation in certain cases of tax-free distributions. For example, if in the illustration in the second preceding paragraph the cash dividend of $900 was received by the Z corporation, the sole stockholder of the X corporation, it would be applied (if the adjusted basis of the stock is not in excess of $900) in reduction of the stock in respect of which the distribution was made and would not increase the earnings and profits of the Z corporation.

* * * * *

Under various provisions of the Internal Revenue Code dealing with exchanges and liquidations, the transfer of the property by a corporation to another corporation results in the nonrecognition, in whole or in part, of the gain or loss realized by the transferor upon such transfer. In such cases well established principles of income tax law require that the earnings and profits of the transferor shall go over to the transferee and shall be considered to be earnings and profits of the transferee for tax purposes. These principles are to be given full effect under section 501. The requirement of section 501 that there shall be no increase or decrease in earnings and profits by reason of a wholly unrecognized gain or loss is but another aspect of the

principle under which the earnings and profits of the transferor become by reason of the transfer the earnings and profits of the transferee.

* * * * *

The amendments to the Internal Revenue Code made by section 501 (a) are by section 501 (c) made applicable to all prior revenue acts, effective as if they were a part of such act on the date of its enactment, thus effecting the application of a uniform rule for the determination of the earnings and profits of all corporations for all prior taxable years. The last sentence of the subsection provides that only the actual tax liability of a shareholder taxpayer for a particular year which is now pending before, or heretofore determined by, the Board of Tax Appeals or any court of the United States, shall remain unaffected by the provisions of section 501. These cases now actually in litigation are left to be determined as the Board or the court may see fit. The result is that the decision in each of these cases will merely determine the tax liability for the particular year of the particular taxpayer, but for every other purpose the determination of the earnings and profits, and of all matters dependent upon such determination the provisions of section 501 govern. Section 501 will therefore control for all purposes as respects the corporation, and as respects the shareholder in litigation for every purpose except that the tax liability for the particular year, as finally determined by the Board or the court, will remain undisturbed.

H. Conference Rep. No. 3002, 76th Cong., 3d Sess., pp. 61–62 (1940–2 Cum. Bull. 548, 564):

* * * * *

The House bill and Senate amendment provided that, in order to effect a uniform rule for all prior years, the stated rules are made applicable to prior Acts, but the Senate amendment added a provision providing that such rules should not affect the tax liability of any taxpayer for any year now pending before, or heretofore determined by, the Board of Tax Appeals, or any court of the United States. The tax liability may be that of the corporation the earnings or profits of which are being determined, or the tax liability of a shareholder of such corporation, or of some other taxpayer. These tax liabilities are left to be determined according to such decisions as the Board or courts may make under existing law. As to all matters except such tax liabilities, such stated rules are applicable, and res judicata will not be applicable. The House recedes with an amendment providing that the exception added by the Senate amendment relative to pending or decided cases shall apply only if the tax liability in question was pending before the Board of Tax Appeals or any court of the United States on September 20, 1940, or was determined prior to such date by the Board of Tax Appeals or any court of the United States.

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No. 452

IN THE

Supreme Court of the United States

October Term, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

CHARLES T. FISHER, EDWARD F. FISHER, AND LEO M. BUTZEL, EXECUTORS OF THE ESTATE OF FRED J. FISHER, AND BURTHA M. FISHER, RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

CITATIONS

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is filed by Burtha M. Fisher and the executors of the Estate of Fred J. Fisher in opposition to the Petition for a Writ of Certiorari which has been filed in this Court by the Commissioner of Internal Revenue. The parties will hereinafter be referred to as "Commissioner" and "Fisher."

INTRODUCTORY STATEMENT

At the outset we believe that the petition is so designed as to tend to mislead this Court, and we feel it necessary to comment on its misleading character.

It is misleading in that it seeks to convey to this Court the impression that the Court below refused to follow the *Wheeler* case, in that it refused to give effect to this Court's holding that the regulations under prior Revenue Acts were valid in requiring the use of transferors' cost in computing "earnings and profits." This is contrary to the facts and the record in this case. As will hereinafter be shown, the lower Court gave full recognition to this Court's decision in the *Wheeler* case, but also held that neither the regulation under the 1934 Act nor the rule prescribed in Section 501 (a) of the Second Revenue Act of 1940 were applicable in determining the tax liability of Fisher for the year before the Court, because of the pendency of this case before the Board of Tax Appeals on September 20, 1940.

The petition is misleading in the following respects:

(1) It states as the question presented that of whether the decision of the Court below conflicts with the decision of this Court in *Commissioner v. Wheeler*.

(2) In advising this Court of action on the case by the Court of Appeals it states at page 5:

> "On review, the Circuit Court of Appeals issued an opinion on March 26, 1945, holding that the Commissioner's regulations were invalid if con-

strued as requiring that earnings and profits be computed on the transferors' basis (Appendix B, infra, pp. 25-32). On May 7, 1945, the Circuit Court of Appeals granted the Commissioner's petition for a rehearing (R. 160). On June 25, 1945, the Circuit Court of Appeals issued a decision which amended its former opinion but which adhered to its previous disposition of the case (R. 160-161)."

The impression that the petition seeks to create is that the Court of Appeals in its Order of June 25, 1945 adhered to its former holding that the regulations under the 1934 Act were invalid.

(3) Included as a part of the petition (Appendix B, pp. 25-32) there is set out not the final opinion of the Court below, which the Commissioner seeks to have reviewed, but the earlier opinion of March 26, 1945. This opinion was amended by the Court's Order of June 25, 1945, the amendment giving full recognition to this Court's decision in the *Wheeler* case.

For the convenience of the Court there is printed in the Appendix hereto, pp. 19 to 24, the full text of the final opinion of the Court of Appeals.

Correctly stated, the history of this case below is as follows. In The Tax Court Fisher urged the correctness of the following propositions:

(1) that under the 1934 Act corporate cost was the proper basis for computing earnings and profits, and

(2) that the rule requiring the use of transferors' cost could not be applied to this case by reason of the

limitation provision in Section 501 (c) of the Second Revenue Act of 1940, providing that "nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940,[1] was pending before, or was theretofore determined by the Board of Tax Appeals, or any court of the United States."

The Tax Court decided in favor of Fisher on both issues. The Court below in its opinion of March 26, 1945, rendered on the same date as the opinion of this Court in the *Wheeler* case, affirmed The Tax Court, holding that its decision was correct on both issues.

Thereafter the Commissioner filed a Petition for Rehearing (R. 155-159), alleging that the opinion of March 26, 1945 was in conflict with this Court's decision in the *Wheeler* case. The Court ordered an oral argument on the Petition for Rehearing (R. 160), and thereafter, on June 25, 1945, entered an Order amending its opinion of March 26, 1945 (R. 160-161). The amendment struck from the earlier opinion that portion of it which was in conflict with this Court's decision in the *Wheeler* case. The orginal opinion of March 26, 1945 contained the following language, which was not stricken by the Court's Order:

> "The statute which governs this situation was first enacted in 1940 and its material portions are printed in the margin. This section in effect provides that corporate earnings and profits on the

[1] As added by the Senate the wording was "*now* pending before." In conference the date of "*September 20, 1940*" was substituted. The Bill was passed by the Senate on September 19, 1940 (86th Cong. Record, Part 11, p. 12352).

sale of assets of the corporation are to be computed in the year when recognized in the same manner as taxable gains are calculated. But the statute also provides that the amendments made by the section shall not affect the tax liability of any transferor (taxpayer)[2] for any year which on September 20, 1940, was pending before or was theretofore determined by the Board of Tax Appeals or any court of the United States. The petition in this case was filed September 6, 1940, and therefore the proceeding is not governed by the amendments of 1940."

The Order of June 25, 1945 inserted immediately after the above quoted language the following:

"In this respect the case is sharply differentiated from *Commissioner v. Wheeler et al., Extrs.*, U.S. ....., decided March 26, 1945, which held valid and applicable Treasury Regulations 101, Art. 115-3, embodying the provisions of the 1940 amendment as to the determination of earnings and profits of a corporation for dividend purposes. Relying upon the cited case, the Commissioner contends that Regulations 86, Art. 115-1, a predecessor of Art. 115-3, requires reversal of the decision of the Tax Court. We think that Art. 115-1 does not govern here, for Treasury Decision No. 5024, 1940-2, Cum. Bull. 110, declares that while the rules stated in the regulations are applicable to cases which were pending before the Board of Tax Appeals on September 20, 1940, the limitation of §§ 501 (c) affects the tax liability for the specific year or years actually so pending on or determined prior to September 20, 1940. This decision aplies the saving clause of §§ 501 (c) to cases governed

[2] It seems apparent that the Court intended to use here the word "taxpayer."

> by Art. 115-1. As a contemporaneous interpretation of the meaning of the regulations by those who are appointed to carry out its provisions, Treasury Decision No. 5024 has great weight and is entitled to respect. *Augustus v. Commissioner*, 118 Fed. (2) 38 (C.C.A. 6), ceritorari denied, 313 U. S. 585. Cf. *Bowles Admr. v. Seminole Rock & Sand Co.*, ... U. S. ....., decided June 4, 1945."

It thus becomes apparent that the Court below gave full recognition to this Court's decision in the *Wheeler* case, and decided this case on its interpretation of a provision of law and the Treasury Department's regulatons thereunder, which were not before this Court in the *Wheeler* case.[3]

QUESTION PRESENTED

The sole question presented by the petition is whether the *final decision* of the Court below conflicts with the decision of this Court in *Commissioner v. Wheeler*, ... U.S. ....., (65 S. Ct. 799) decided March 26, 1945.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved are set forth in Appendix A to the petition, pp. 16-32.

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[3] The petition in the *Wheeler* case was not pending on September 20, 1940. It was filed with the Board of Tax Appeals on May 12, 1941 (Record No. 354; October Term, 1944; p. 1).

STATEMENT OF THE CASE

In the Introductory Statement, *supra*, pp. 2 to 6, we have called the Court's attention to the misleading statement on page 5 of the petition, respecting the action on this case by the Court below. With that correction we adopt the Statement of Facts set out in the petition (pp. 2-5), with the following added relevant facts which were omitted from the petition.

The distribution of January 31, 1934 to Fred J. Fisher was made pursuant to authority contained in a resolution of the Board of Directors of Senior Investment Corporation, adopted at a duly called special meeting of the Directors held on January 31, 1934, which authorized and directed the distribution and referred to it specifically as a capital distribution. This action of the Directors was approved and confirmed by the stockholders at the annual meeting held on May 8, 1934 (R. 15-16, 26-27). Fred J. Fisher and his wife in their joint income tax return for the year 1934 did not report as taxable income the value of the shares distributed to him on the ground that said distribution was a capital distribution to be applied against the cost or basis in the hands of Fred J. Fisher of the shares of Class A stock of Senor Investment Corporation, on which the distribution was made (R. 16).

REASONS FOR DENYING THE WRIT

(1) The Final Opinion of the Court Below Does Not Conflict with the Decision in the *Wheeler* Case, But Rests Upon the Lower Court's Interpretation of the Limitation Provision of Section 501 (c) of the Second Revenue Act of 1940 and the Treasury Regulations Issued Thereunder, Which Were Not in Issue in the *Wheeler* Case

As pointed out in the Introductory Statement, the final opinion of the Court below is not in conflict with the *Wheeler* decision, but expressly gave recognition to it. The original opinion of March 26, 1945, rendered on the same day as this Court's opinion in the *Wheeler* case, reached a different conclusion than did this Court as to the basis to be used under the Revenue Act of 1938 and prior Acts in computing earnings and profits available for dividend purposes. It also affirmed The Tax Court on the ground that Section 501 (c) of the Second Revenue Act of 1940 and the regulations issued thereunder required the use of corporate cost as a basis, because of the pendency of this proceeding before the Board of Tax Appeals on September 20, 1940.

In its action on the Petition for Rehearing the lower Court had for its guidance the decision of this Court in the *Wheeler* case. It therefore receded from its prior position respecting the validity of the earlier regulation, but considered further the question of whether its application might be affected by the limitation provision in Section 501 (c). In affirming The Tax Court on the rehearing the lower Court rested its decision entirely on the limitation provision of Section 501 (c) and Treasury Decision 5024 interpreting the same (Petition, Appendix

A, pp. 21-24. The limitation provision of Section 501 (c) and the regulations thereunder were not in issue in the *Wheeler* case, the petition in the *Wheeler* case having been filed with the Board of Tax Appeals in May, 1941. The fact that they were not in issue was brought out during the course of the oral argument of the *Wheeler* case in this Court. During the argument the following colloquy, which has been taken from a stenographic transcript thereof, occurred between Mr. Justice Jackson and Mr. Whitney, counsel for the Wheeler estate:

> "Justice Jackson: You have not told us whether you attach any importance to this tax liability if it is not applied to cases in litigation on September 20, 1940. I ask that, because your case appears to have been in controversy, but had not reached the litigation stage.
>
> "Mr. Whitney: Your Honor, I do not rely on that.
>
> "Justice Jackson: If we were of a disposition to disagree with you on that, would you then rely on that?
>
> "Mr. Whitney: No, your Honor. I think we have really covered the subject."

It is apparent, therefore, that the opinion of the Court below in this case is not in conflict with the *Wheeler* case, and, that being the sole basis on which the petition is grounded, it should be denied.

(2) No Other Grounds Are Alleged and There Are No Other Grounds Calling for a Review by This Court

No other grounds for granting the Writ, as set out in the rules of this Court, are alleged by the Commissioner nor, so far as we know, are there any such other grounds. No other Court of Appeals has had occasion to interpret the limitation provision of Section 501 (c) of the Second Revenue Act of 1940 and the regulations issued thereunder. The only other cases involving that provision decided by The Tax Court are *Falkland Corporation v. Commissioner* (T.C. Memo. Op.; C.C.H. Dec. 12,170-A) and *Senior Investment Corporation v. Commissioner*, 2 T.C. 124. In both cases The Tax Court reached the same conclusion on the meaning of the limitation provision of Section 501 (c) as was reached by the lower Court in this case. In *Falkland Corporation*, The Tax Court, viewing Section 501 (a) as clarifying legislation, said:

> "As to the effect of the Second Revenue Act of 1940: The respondent does not contend that the present case is expressly covered thereby, but merely argues that light is cast upon the law existing prior thereto, since the Ways and Means Committee Report indicates that the amendment set forth in section 501 (a) had the purpose of clarifying the law as to what constitutes earnings and profits of a corporation. But even if we assume that there was some intent to clarify the pre-existing law, we think it clear that no effect can be had upon the instant proceeding, for section 501 (c), although specifically providing that subsection (a) (in effect providing for the use of adjusted basis in determining earnings and profits under section 115) shall be effective as a part of prior revenue acts, goes on to provide specifically that

> nothing in such subsection 'shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States.' This is such case, and it would be clear error, we think, in the light of such statute, to hold that the statute of 1940 affects the tax situation of the present taxpayer."

The Commissioner appealed the *Falkland* case to the Circuit Court of Appeals for the Second Circuit, where it was disposed of on stipulation, without a decision on the merits. While the case of *Senior Investment Corporation* is now pending before the Circuit Court of Appeals for the Sixth Circuit, it is there on two issues, and the issue respecting the proper method for computing earnings and profits is a comparatively minor one.

We know of no other case pending which involves the application of the limitation provision of Section 501 (c) except that of *Senior Investment Corporation*. It seems apparent that since the limitation applies only to cases pending on September 20, 1940, or theretofore decided, there will be no other cases involving the question.

The discussion in the petition under the heading "Reasons for Granting the Writ" is confined almost entirely to an argument that the Court below erroneously interpreted the limitation provision of Section 501 (c) and the regulations issued thereunder. In the absence of a conflict between Circuit Courts this is not a ground for granting a Writ of Certiorari.

Although the petition states (p. 14) that "the Court below has so far departed from the usual course of ju-

dicial proceedings as to call for this Court's supervisory review," it is apparent that the only basis for this statement is the Commissioner's contention that the opinion below is in conflict with the opinion in the *Wheeler* case. We have already demonstrated that such is not the case.

(3) The Case Was Correctly Decided Below

During the consideration of this case the Commissioner has changed his position with respect to the meaning of the limitation clause in Section 501 (c). In his brief in the Circuit Court (pp. 25-26) he said that the only reasonable explanation of the limitation clause in that subsection "is that the exception was enacted because Congress, quite rightfully, did not believe that it would be proper for it to dictate to the Judiciary the manner in which the courts should decide controversies over which jurisdiction had already been taken or to interfere with decisions already reached. • • • • Because Congress refused to interfere with the jurisdiction of the courts to decide pending cases which, of course, includes their jurisdiction to err, it does not mean that Congress intended to direct or urge the courts to make a wrong decision." In the brief filed in the Court below we argued that this interpretation of the meaning of the limitation clause in effect amounted to Congressional sanction to decisions of The Tax Court or other lower United States Courts in all cases pending on September 20, 1940 or theretofore decided, regardless of the basis for determining earnings and profits approved by such decisions.

The Commissioner now seems to have abandoned that theory of the meaning of the limitation clause. In the

petition herein he interprets his regulations thereunder, and presumably the statutory provision itself, as merely providing that "if there should be an erroneous final decision in favor of a particular taxpayer in a case pending on September 6 (20), 1940, or already decided, the finality of the decision would be limited to the particular year involved and *res judicata* would not operate to give him (or other stockholders in the same corporation) a vested right in the wrong method of computing earnings and profits for all other taxable years" (Petition, p. 12).

Apparently the Commissioner would have this Court believe that Congress provided a general rule by legislation, and in the same subsection of the statute further provided that should any court refuse to follow that general rule such decision would not be *res judicata* for other years. It seems unnecessary to argue that Congress would not enact such legislation. We know of no instance where any legislative body has been guilty of such absurd legislative practice.

The Commissioner's theory is untenable. There was no need for Congress to deny to taxpayers with cases pending on September 20, 1940, or theretofore decided, in which there might be an erroneous *final* decision, the right to rely on such decision in cases involving other years. Had the limitation provision not been added, the cases pending on that date, and those theretofore decided (but not finally), would have been finally decided by the application of the rule set out in Section 501 (a). It would have been entirely unnecessary to add the second sentence of Section 501 (c), and this is so whether Section 501 is viewed as clarifying legislation or as new legislation. Moreover, the Commissioner's present theory is wholly illogical. If the purpose of Congress were, as

the Commissioner now states it, Congress certainly would not have made the limitation applicable only to cases pending on September 20, 1940, or theretofore decided, since there apparently was as much likelihood of "an erroneous final decision" in cases arising after September 20, 1940, or thereafter decided, as in cases pending on September 20, 1940, or theretofore decided.

The first sentence of Section 501 (c) reads as follows:

> "For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this Act shall be effective as if they were a part of each such Revenue Act on the date of its enactment."

However, Congress did not stop there but added a second sentence in the subsection, reading as follows:

> "Nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States."

The only meaning that can be given to subsection (c) of Section 501 is the following. The first sentence thereof makes the general rule of Section 501 (a), requiring the use of transferors' cost for determining earnings and profits, applicable to 1938 and all prior years. The limitation provision in the second sentence states an exception to the general rule, and makes it plain that the rule requiring the use of transferors' cost, found in Section 501 (a), is not to affect, or be applied in determining, the tax liability of a taxpayer for a particular year which on September 20, 1940 was pending before, or was

theretofore decided (but not finally), by the Board of Tax Appeals or any court of the United States. Congress thereby not only rejected the rule requiring use of transferors' cost in such cases, but as to them prescribed the use of corporate cost for determining earnings and profits.

The reason for the exception is plain. Congress was aware of the fact that the Board of Tax Appeals and the Federal Courts had uniformly held theretofore that the proper method for determining earnings and profits was by reference to corporate cost (H. R. Rept. 2894; 76th Cong.; 3rd Sess.; pp. 41, 42). In the light of that knowledge Congress was merely providing against the unfair and inequitable tax consequences which might otherwise result for those taxpayers who had consummated transactions in reliance on the uniform interpretation found in the earlier Board and Court decisions.

The Treasury Department's interpretation of Section 501 (c) is found in paragraph 2 of Treasury Decision 5024 (Petition, Appendix A, pp. 23-24). After stating in the first sentence that the rules requiring use of transferors' cost are applicable to all years prior to 1939, the paragraph provides as follows:

> "Although under section 501 (c) the final determination by the Board of Tax Appeals or any court of the United States of the tax liability of any taxpayer for any such taxable year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States, is not affected by the enactment of section 501, the rules stated in the regulations are applicable to such cases inasmuch as such rules are a proper interpretation of the law as it existed prior to the enactment of section 501. The limitation in section

> 501 (c) has application only to such taxpayer, and in the case of such taxpayer, only with respect to the tax liability for the specific year or years actually so pending on, or so determined prior to, September 20, 1940."

The above quoted regulation states and gives full effect to the exception found in the statute. The last sentence of it reaffirms the exception, but is further designed to prevent a decision required by the exception from being controlling in determining tax liability of the taxpayer for any other year. This is in accord with the interpretation given to the regulation by the Court below, and is the only reasonable interpretation that can be given it.

The limitation by the Treasury upon the retroactive effect of the rules for determining earnings and profits, as applied to the tax liability of particular taxpayers, is merely a recognition in the regulations of the plain meaning of the saving clause found in Section 501 (c). However, without the statutory saving clause, the limitation on retroactive effect set out in Treasury Decision 5024 is a valid exercise by the Commissioner and the Secretary of the discretion expressly given them by Section 3791 (b) of the Internal Revenue Code, which reads as follows:

> "(b) *Retroactivity of Regulations or Rulings.*—The Secretary, or the Commissioner, with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect.[4]

[4] See Paul's "Selected Studies in Federal Taxation," Second Series, pp. 76-103, for an exhaustive discussion of the legislative history of this provision and of the Congressional intent to do equity and fairness thereby.

We have here the unusual case where Congress did not leave to the Secretary or the Commissioner the discretion to apply general rules without retroactive effect. Instead, Congress set out the limitation expressly in the statute.

On pages 13 and 14 of the petition the Commissioner argues that the Court below rested its interpretation of Treasury Decision 5024 on the Commissioner's supposed desire to avoid retroactive application of Article 115-1 of Regulation 86. The Commissioner says at page 13:

> "It was suggested that, having first adopted the use of the transferors' basis in the regulation here applicable (Art. 115-1 of Treasury Regulation 86), and having promulgated the regulation after the beginning of the taxable year 1934, the Commissioner wished to avoid a retroactive application thereof."

In connection with this argument by the Commissioner we desire to point out, first, that Article 115-1 of Regulation 86, as stated in the opinion of the lower Court, was promulgated on February 11, 1935 (not just "after the beginning of the taxable year 1934"), and, second, that the language of the opinion there commented on by the Commissioner does not form the basis for the Court's conclusion. It merely sets out the equities which the Court found to exist on the facts of the particular case, namely, that the distribution was made on January 31, 1934, and Article 115-1 of Regulation 86 (being the first regulation on the subject) was promulgated on February 11, 1935. The basis of the lower Court's conclusion is concisely stated in the last sentence of its opinion, which reads:

"Since the decision (T.D. 5024) was made by the Commissioner with the approval of the Secretary of the Treasury, this limitation upon the retroactivity of the regulations has a double Congressional sanction, one arising from the saving clause in Sec. 501 (c), the other from the specific authority granted the Commisioner with approval of the Secretary, under Sec. 3791 (b) of the Internal Revenue Code, to limit the retroactive effect of any ruling, regulation or treasury decision relating to the internal revenue laws in precisely this way."

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

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October, 1945.

APPENDIX

Opinion Rendered on March 26, 1945, as Amended by Order of June 25, 1945

BEFORE HICKS, ALLEN AND MARTIN, CIRCUIT JUDGES

Allen, Circuit Judge. The principal question presented in this case is whether the taxpayer received in 1934 a taxable dividend paid out of earnings and profits of the Senior Investment Corporation. The Commissioner determined a deficiency of $1,231,636.92, based primarily upon a distribution by the Senior Investment Corporation in 1934 of 43,400 shares of common stock of General Motors Corporation. The Tax Court held that the Senior Investment Corporation had a large operating deficit on the date of the distribution of the shares, and that no taxable dividend was received.

The material facts as stipulated and found by The Tax Court are as follows:

The tax return involved was made for 1934 as a joint return by Fred J. Fisher and his wife, Burtha M. Fisher, residents of Detroit, Michigan. In January 1934, Fisher owned all of the outstanding Class A shares of the Senior Investment Corporation, 71,573 in number. The cost to him of these shares was not less than $1,723,881.25. On January 31, 1934, without surrendering any of the Class A shares Fisher received as a distribution on the stock 43,300 shares of General Motors common stock having a value of $1,723,881.25. The Senior Investment Corporation was incorporated July 29, 1929, with 300,000 shares

of no par value stock, consisting of 100,000 shares each of Class A, B, and C stock. Immediately following the incorporation the Fishers transferred certain assets, particularly securities, to the Senior Investment Corporation. The cost to the Fishers and the July 29, 1929, fair market value of the assets transferred and the number of shares issued to them therefor by the Senior Investment Corporation are shown in the following table:

	Cost	July 29, 1929 Fair Market Value	Number of Senior Shares Issued
Fred J. Fisher	$12,947,242.88	$42,943,427.76	71,573 Class A 79,805 Class C
	894,060.02	40,000,000.00	100,000 Class B
Burtha M. Fisher	699,350.00	5,486,250.00	9,143 Class A 10,195 Class C

The remaining 10,000 Class C shares were issued to an employee for no consideration. On December 9, 1931, the Senior Investment Corporation retired the 9,143 Class A shares held by Burtha M. Fisher.

In computing its gain or loss from the sale or other disposition of the assets received for its shares on incorporation the Senior Investment Corporation used as a basis the fair market value of such assets on the date received. As a result the corporation had a large operating deficit on January 31, 1934, when the General Motors Corporation shares were distributed to Fisher. The Commissioner used the transferors' costs as a basis, and thus computed, the books of the corporation showed a surplus in excess of $1,723,881.25 available for distribution of dividends. Since Fisher did not receive a taxable dividend unless the Senior Investment Corporation had a surplus available for distribution of dividends, the case turns upon the question whether the corporation, in computing its gain or loss on the sale of the assets acquired by it

from the Fishers in exchange for its own stock, should have used as a basis the fair market value of the assets at the time of the exchange, or the transferors' cost. The Tax Court, relying upon decisions of its own and of other courts (Cf. *Commissioner v. W. S. Farish & Co.*, 104 Fed. (2d) 833 (C.C.A. 5); *Commissioner v. F. J. Young Corp.*, 103 Fed. (2d) 137 (C.C.A. 3)), held that the basis used by the Senior Investment Corporation was correct and declined to sustain the deficiency.

The Commissioner contends that when a corporation acquires assets in a transaction where the transferors' gain or loss is not recognized for tax purposes, the corporation's earnings and profits for dividend purposes are determined in the same manner as its taxable gains. The transactions between the Fishers and the Senior Investment Corporation were tax free within §§ 112 of the Revenue Act of 1934.

The statute which governs this situation was first enacted in 1940 and its material portions are printed in

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* Second Revenue Act of 1940, c. 757, 54 Stat. 1004.

Sec. 501. EARNINGS AND PROFITS OF CORPORATIONS*—

(a) Under Internal Revenue Code. Section 115 of the Internal Revenue Code is amended by inserting at the end thereof the following new sub-sections:

"(1) Effect on Earnings and Profits of Gain or Loss and of receipt of Tax-Free Distributions. The gain or loss realized from the sale or other disposition (after February 28, 1913) of property by a corporation—

"(1) for the purpose of the computation of earnings and profits of the corporation, shall be determined, except as provided in paragraph (2), by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain, except that no regard shall be had to the value of the property as of March 1, 1913; but

the margin.* This section in effect provides that corporate earnings and profits on the sale of assets of the corporation are to be computed in the year when recognized in the same manner as taxable gains are calculated. But the statute also provides that the amendments made by the section shall not affect the tax liability of any transferor for any year which on September 20, 1940, was pending before or was theretofore determined by the Board of Tax Appeals or any court of the United States. The petition in this case was filed September 6, 1940, and therefore the proceeding is not governed by the amendments of 1940. In this respect the case is sharply differentiated from *Commissioner v. Wheeler, et al., Extrs.*, ... U.S. ....., decided March 26, 1945, which

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*"(2) for the purpose of the computation of earnings and profits of the corporation for any period beginning after February 28, 1913, shall be determined by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain."

Gain or loss so realized shall increase or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing net income under the law applicable to the year in which such sale or disposition was made. Where in determining the adjusted basis used in computing such realized gain or loss the adjustment to the basis differs from the adjustment proper for the purpose of determining earnings or profits, then the latter adjustment shall be used in determining the increase or decrease above provided. * * * * *

(b) Effective Date of Amendment. The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938.

(c) Under Prior Acts. For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this section shall be effective as if they were a part of each such Revenue Act on the date of its enactment. Nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals or any court of the United States.

held valid and applicable Treasury Regulations 101, Art. 115-3, embodying the provisions of the 1940 amendment as to the determination of earnings and profits of a corporation for dividend purposes. Relying upon the cited case, the Commissioner contends that Regulation 86, Art. 115-1, a predecessor of Art. 115-3, requires reversal of the decision of the Tax Court. We think that Art. 115-1 does not govern here, for Treasury Decision No. 5024, 1940-2, Cum. Bull. 110, declares that while the rules stated in the regulations are applicable to cases which were pending before the Board of Tax Appeals on September 20, 1940, the limitation of Sec. 501 (c) affects the tax liability for the specific year or years actually so pending on or determined prior to September 20, 1940. This decision applies the saving clause of Sec. 501 (c) to cases governed by Art. 115-1. As a contemporaneous interpretation of the meaning of the regulations by those who are appointed to carry out its provisions, Treasury Decision No. 5024 has great weight and is entitled to respect. *Augustus v. Commissioner*, 118 Fed. (2d) 38 (C.C.A. 6), certiorari denied, 313 U.S. 585. Cf. *Bowles, Admr. v. Seminole Rock & Sand Co.*, ... U.S. ....., decided June 4, 1945.

In view of the fact that the transaction involved took place on January 31, 1934, and Art. 115-1 was promulgated on February 11, 1935, Treasury Decision No. 5024 may be viewed as a limitation on its retroactive effect. Since the decision was made by the Commissioner with the approval of the Secretary of the Treasury, this limitation upon the retroactivity of the regulations has a double congressional sanction, one arising from the saving clause in Sec. 501 (c), the other from the specific author-

ity granted the Commissioner with the approval of the Secretary, under Sec. 3791 (b) of the Internal Revenue Code, to limit the retroactive effect of any ruling, regulation or treasury decision relating to the internal revenue laws in precisely this way.

The decision of The Tax Court is affirmed.

No. 452

In The

Supreme Court of the United States

OCTOBER TERM, 1945

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

CHARLES T. FISHER, EDWARD F. FISHER and LEO M. BUTZEL, Executors of the Estate of Fred J. Fisher and BURTHA M. FISHER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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REARDON-PARSHALL CO.

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Commissioner of Internal Revenue,
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Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENTS

Respondents respectfully submit this brief in opposition to the brief on behalf of the Commissioner of Internal Revenue, petitioner.

QUESTION PRESENTED

Petitioner's brief states that the question presented is whether the decision of the court below conflicts with the decision of this court in *Commissioner v. Wheeler*, 324 U.S. 542. The question presented is much narrower and may be stated as follows:

> Did the court below properly construe Section 501(c) of the Second Revenue Act of 1940 and Treasury Decision 5024 as making inapplicable, in determining respondents' tax liability for 1934, the rules set out in Section 501(a) of that Act, and in Article 115-1, Regulations 86?

STATUTES AND OTHER AUTHORITIES INVOLVED

Statutes and other authorities involved are set forth in Appendix A to petitioner's brief, pages 33-41. Excerpts from the pertinent Congressional Committee Reports are set forth in Appendix B to petitioner's brief, pages 42-52.

STATEMENT OF THE CASE

In the statement of the case in petitioner's brief (pp. 2-5) there appear two statements which are misleading. In the concluding sentence of the first paragraph appearing on page 4 petitioner says "if gain or loss were computed by using the fair market value of those assets as of the date they were exchanged for its stock, Senior Investment Corporation would have had an operating deficit as

of January 31, 1934." From this it might be inferred that Senior Investment Corporation did not in its books and records compute earnings and profits by using as a basis the fair market value of its assets when acquired for its stock. The stipulation between the parties shows that gain or loss was computed on the books of Senior Investment Corporation by the use of corporate cost for assets acquired in exchange for its stock, that the corporation had an adjusted book deficit on June 30, 1933, of $20,530,234.13, and that its earnings and profits between June 30, 1933, and January 31, 1934, the date of the distribution herein involved, computed on the basis of either corporate cost or transferor's cost, showed a loss (R. 14, 18).

The concluding sentence of the final paragraph of petitioner's statement on page 5 of his brief reads as follows:

> "On June 25, 1945, the Circuit Court of Appeals issued a decision which amended its former opinion but which adhered to its previous disposition of the case on the ground that the corporation's earnings and profits were to be computed in relation to the market value of the assets as of the date they were acquired by the corporation (R. 112-113)."

This is an incorrect statement of the decision by the court below. The Circuit Court on June 25, 1945, did amend its former opinion but adhered to its previous disposition of the case only to the extent that it reiterated its affirmance of the decision of The Tax Court. However, it did not do so on the grounds stated by petitioner. The final opinion of the court below recognized that for all purposes, except the determination of tax liability of a taxpayer whose case was pending on September 20, 1940 or theretofore decided, a corporation's earnings and profits on the disposition of assets acquired in a tax-free ex-

change were to be computed on the basis of transferor's cost. In disposing of the case following the rehearing it affirmed The Tax Court on the ground that the exception found in the last sentence of Section 501(c) of the Second Revenue Act of 1940 and Par. 2 of Treasury Decision 5024 required that neither the rule requiring the use of transferor's cost found in Section 501(a) nor the earlier Regulation (Art. 115-1, Regs. 86), embodying the same rule, were to affect the tax liability of this individual taxpayer whose case was pending on September 20, 1940.

With the above corrections we accept the statement set out in petitioner's brief, with the following additional relevant facts which petitioner has persisted in ignoring both in his petition for certiorari and in his brief:

The distribution of January 31, 1934, to Fred J. Fisher was made pursuant to authority contained in a resolution of the Board of Directors of Senior Investment Corporation, adopted at a duly called special meeting of the Directors held on January 31, 1934, which authorized and directed the distribution and referred to it specifically as a capital distribution. This action of the Directors was approved and confirmed by the stockholders at the annual meeting held on May 8, 1934 (R. 11, 19). Fred J. Fisher and his wife in their joint income tax return for the year 1934 did not report as taxable income the value of the shares distributed to him on the ground that said distribution was a capital distribution to be applied against the cost or basis in the hands of Fred J. Fisher of the shares of Class A stock of Senior Investment Corporation, on which the distribution was made (R. 11).

PETITIONER'S SPECIFICATION OF ERRORS

If the errors to be urged as set out by the petitioner in his brief (p. 6) correctly state his position with respect to error by the court below, then the Commissioner's position in this court is defeated on his own brief. Petitioner says the court below erred (1) in deciding that the corporation here involved was not required to compute its earnings and profits in relation to transferor's cost for assets acquired in a tax-free transaction, and (2) that the corporation did not have sufficient earnings and profits for a distribution to constitute a taxable dividend.

You may search the final opinion of the court below in vain to find any such holding by the Circuit Court. The Court found that Section 501(a) did require "that corporate earnings and profits on the sale of assets of the corporation are to be computed in the year when recognized in the same manner as taxable gains are calculated" (R. 109). Its final opinion affirming The Tax Court was based on the proposition that by reason of the limitation clause in Section 501(c) of the Second Revenue Act of 1940 and Treasury Decision 5024, issued by the Commissioner as an interpretation thereof, the rules prescribed in Section 501(a) and in the earlier Regulation (Art. 115-1, Regs. 86) were not to affect the tax liability of this taxpayer, because of the pendency of this case before The Tax Court on September 20, 1940.

ARGUMENT

1. This Case Is Not Governed by the Decision of this Court in the *Wheeler* Case, Since this Proceeding Was Pending Before the Board of Tax Appeals (Now The Tax Court of the United States) on September 20, 1940, Whereas the *Wheeler* Case Was Not So Pending.

Section 501(c) of the Second Revenue Act of 1940 reads as follows:

> "(c) *Under Prior Acts.*—For the purposes of the Revenue Act of 1938 or any prior Revenue Act the Amendments made to the Internal Revenue Code by subsection (a) of this section shall be effective as if they were a part of each such Revenue Act on the date of its enactment. Nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States."

The petition in the instant case was filed with the Board of Tax Appeals on September 6, 1940. That in the *Wheeler* case was not filed with the Board until May 12, 1941 (Record No. 354, Oct. term, 1944, p. 1). It is apparent, therefore, that this taxpayer comes within the limitation clause and that the *Wheeler* case did not. Upon oral argument in the *Wheeler* case this Court recognized the significance of the limitation clause of Section 501(c). During the argument the following colloquy, which has been taken from a stenographic transcript thereof, occurred between Mr. Justice Jackson and Mr. Whitney, counsel for the Wheeler estate:

"Justice Jackson: You have not told us whether you attach any importance to this tax liability if it is not applied to cases in litigation on September 20, 1940. I ask that, because your case appears to have been in controversy, but had not reached the litigation stage.

"Mr. Whitney: Your Honor, I do not rely on that.

"Justice Jackson: If we were of a disposition to disagree with you on that, would you then rely on that?

"Mr. Whitney: No, your Honor. I think we have really covered the subject."

Since this case was pending on September 20, 1940, this Court must construe and apply Section 501(c) and determine the effect of the exception stated in the last sentence thereof. In *Hellmich v. Hellman*, 276 U.S. 233, 237, this Court referred to the principle as "the long established rule that the intention of the lawmakers is to be deduced from a view of every material part of the statute • • •"

Petitioner in his brief recognizes the necessity of determining the application to the instant case of the exception stated in the last sentence of Section 501(c). Although in his summary of argument (p. 6) he says there is no necessity to resort to the Second Revenue Act of 1940 and nothing in that Act is relied upon to affect the taxpayer's tax liability, elsewhere in his brief (pp. 24-25) he concedes that resort must be had to Section 501(c) and attempts to interpret the exception found in the last sentence thereof in such a way as to render it meaningless.

2. The Court Below Correctly Construed Section 501(c) and Treasury Decision 5024 as Requiring Affirmance of The Tax Court on the Ground that Neither the Rules for Computing Earnings and Profits Found in Section 501(a) Nor Those Found in Article 115-1, Regulations 86, Were to Affect the Tax Liability of This Taxpayer in This Proceeding.

The court below construed the exception clause in Section 501(c) as (1) making the rules in Section 501(a) inapplicable in determining respondents' tax liability, and (2) likewise making inapplicable in determining respondents' tax liability the same rules contained in Article 115-1, Regulations 86. It held that Treasury Decision 5024 applied the saving clause of Section 501(c) to cases governed by Article 115-1, Regulations 86. Based on those conclusions as to the application of Section 501(c) and Treasury Decision 5024, it affirmed the decision of the Tax Court. This construction by the court below is the only interpretation that can be given to the Statute and the Regulation.

Before this Court in the *Wheeler* case the Commissioner argued that (1) the case was governed by Regulations 101, Article 115-3, and that Section 501 of the Second Revenue Act was an approval of the rule stated therein and a clarification of pre-existing law and (2) viewing Section 501 as new legislation, its retroactive application was valid and constitutional. The pertinent portion of that Regulation appeared also in Regulations 94, Article 115-3, under the 1936 Act, and Regulations 86, Article 115-1, promulgated February 11, 1935, under the 1934 Act. This Court in reversing the court below upheld the validity of Article 115-3 of Treasury Regulations 101, and held further that it was intended to and did apply to the facts of that case.

In Subsection (a) of Section 501 Congress amended Section 115 of the Internal Revenue Code by prescribing detailed rules for determining earnings and profits of all corporations, and by Subsection (b) it provided that such amendments were applicable to taxable years beginning after December 31, 1938.

By the first sentence of Subsection (c) Congress provided that for the purposes of all prior Revenue Acts, the amendments made by Subsection (a) should be effective as if they were a part of each such Act on the date of its enactment, for the purpose of "effecting the application of a uniform rule for the determination of the earnings and profits of all corporations for all prior taxable years."[1] After thus stating the general rule Section 501(c) goes on and states the exception in the following language:

> "Nothing in this subsection shall affect the tax liability of any taxpayer which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States."

This sentence clearly provides an exception to the general rule found in the first sentence of the subsection. Viewed in that light, its meaning seems apparent.

In the first sentence of the subsection Congress was stating a rule of general application. The second sentence states an exception to that rule applicable to two limited classes of taxpayers, namely, those with cases theretofore decided by and those with cases then pending before the Board or any Federal court. The language of the exception clause is clear and understandable. As applied to

[1]Senate Rept. No. 2114, 76th Cong., 3rd Sess., p. 27.

this case it says, that the rules found in Subsection (a) requiring use of transferor's cost which are made effective as if a part of all prior Revenue Acts by the first sentence of Subsection (c), shall nevertheless not affect the determination of tax liability of this taxpayer. The word "affect" is defined in Webster's New International Dictionary, p. 37, as follows: "To lay hold on; to act upon; impress or influence; it is often used in the sense of acting injuriously upon persons and things, 93 U.S. 84." In Bouvier's Law Dictionary, Baldwin's edition, 1934, it is defined as: "To have an effect upon; to act upon; impress or influence; it is often used in the sense of acting injuriously upon persons and things, 93 U.S. 84." This taxpayer in his income tax return determined his tax liability on the theory that corporate cost was the proper method to be used in determining the earnings and profits of Senior Investment Corporation. His tax liability would be affected by the application of the rules found in Subsection 501(a). The exception clause in clear and unmistakable language says that his tax liability shall not be so affected.

It seems equally clear that, looking to the statutory language alone, it has the effect of rendering inapplicable to pending or theretofore decided cases the rule of Article 115-1 of Regulations 86 under the 1934 Act and corresponding Regulations under later Acts. In enacting Section 501 congress was aware of the fact that it was enacting into law the rule as to which the Treasury had previously issued Regulations, but which had been rejected by the Board of Tax Appeals and all Federal courts where the question was litigated.[2] In providing in

[2]H. Rept. No. 2894, 76th Cong., 3rd Sess., p. 41.

the exception clause that the rule first promulgated in Article 115-1, Regulations 86, and made a part of the statute by Subsection (a) of Section 501, should not affect the tax liability of a taxpayer in a case pending on September 20, 1940, it must be presumed that Congress intended that this rule, whether found in such Regulations or in Section 501 itself, should not affect or change the tax liability of such a taxpayer. If any doubt exists from a reading of the statutory language alone, those doubts are resolved when we look to the Treasury's contemporaneous interpretation of Section 501(c) which is found in Treasury Decision 5024 (Pet. Br. 39-41). Par. 2 of that Treasury Decision reads as follows:

> "The above amendments to Regulations 103 (which regulations cover taxable years beginning after December 31, 1938), are hereby made applicable to taxable years beginning prior to January 1, 1939 (such years being covered by Regulations 101, 94, 86, 77, 74, 69, 65, 62, 45, and 33). Although under Section 501(c) the final determination by the Board of Tax Appeals or any court of the United States of the tax liability of any taxpayer for any such taxable year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States, is not affected by the enactment of Section 501, the rules stated in the regulations are applicable to such cases inasmuch as such rules are a proper interpretation of the law as it existed prior to the enactment of Section 501. *The limitation in Section 501(c) has application only to such taxpayer, and in the case of such taxpayer, only with respect to the tax liability for the specific year or years actually so pending on, or so determined prior to, September 20, 1940.*" (Italics supplied.)

It will be seen that the amendments to Regulations 103, applicable to all years after 1938, are by Par. 2 of the Treasury Decision made applicable to all prior years and the Regulations covering such years. The paragraph then continues by stating that although the tax liability in pending or theretofore decided cases is not affected, the rules stated in the Regulations are nevertheless applicable to such cases. This statement is then followed by the exception reading as follows: "The limitation in Section 501(c) has application only to such taxpayer, and in the case of such taxpayer, only with respect to the tax liability for the specific year or years so pending on, or so determined prior to, September 20, 1940." The Treasury itself has here said in clear and understandable language that although the rules found in the amendments to the Regulations are applicable to cases pending on September 20, 1940 or theretofore decided, the rules, nevertheless, shall be applied in the light of the limitation in Section 501(c) and, therefore, shall not be applied in determining the tax liability of such a taxpayer for the specific year that was pending on September 20, 1940, or theretofore decided.

Although on a first reading, the clause preceding the last sentence of the Treasury Decision may seem inconsistent with the exception stated in the last sentence, this seeming inconsistency disappears when each is given its true meaning. The application of the rules affects many things other than the tax liability of a particular taxpayer in a particular proceeding to which the exception applies. Thus, if a corporation had a case pending on September 20, 1940, involving an issue calling for the aplication of the rules, the rules would be applicable for all purposes

except as they might affect or change the corporation's tax liability for the year involved in that case. The rules would be applicable for determining its earnings and profits for all other purposes, such as the taxable status of distributions to its shareholders, unless also included within the exception, and the computation of its equity invested capital for excess profits tax purposes. The House Ways and Means Committee makes this clear when it says that the amendment is important "not only for the purpose of determining whether distributions are taxable dividends but also in determining equity invested capital for excess-profits-tax purposes."[3]

If the case pending were that of an individual shareholder, involving a particular year, the rules would be applicable in determining his corporation's earnings and profits for all purposes, except that they could not affect or change his tax liability for that year. Thus, the rules would be applicable (1) for all purposes as respects the corporation, such as its right to a dividends paid credit if a personal holding company, the computation of its undistributed adjusted net income for the purpose of determining surtax on undistributed profits under the 1936 Act, and the computation of its equity invested capital for excess profits tax purposes; (2) in determining the taxable status of distributions to all other shareholders not likewise within the exception; and (3) in determining the taxable status of a distribution to the same shareholder for another year not then pending or theretofore decided. The Senate Finance Committee, which inserted the exception clause in the Bill, had in mind just such an application of the rules and such a limitation on their application in determining tax liability in pending and

[3] H. Rept. No. 2894, 76th Cong., 3rd Sess., p. 41.

decided cases. In speaking of the shareholder-taxpayer within the exception the Committee report (S. Rept. No. 2114, 75th Cong., 3rd Sess., pp. 26, 27) says: "Section 501 will therefore control for all purposes as respects the corporation, and as respects the shareholder in litigation for every purpose except that the tax liability for the particular year, as finally determined by the Board or the court, will remain undisturbed."

In construing the statutory exceptions the Treasury did not seek to narrow its application beyond providing that the exception had application "only to such taxpayer (with a case pending on September 20, 1940, or theretofore decided) and in the case of such taxpayer, only with respect to the tax liability for the specific year or years actually so pending on, or so determined prior to, September 20, 1940."

The first sentence of Par. 2 of Treasury Decision 5024 provides that "The above amendments to Regulations 103 • • • are hereby made applicable to taxable years beginning prior to January 1, 1939 (such years being covered by Regulations 101, 94, 86, 77, 74, 69, 65, 62, 45, and 33)."

In measuring the significance of that sentence it should be borne in mind that the Regulations under all Acts prior to the Act of 1934, which is covered by Regulations 86, were silent on the question of what constituted earnings and profits. The first Regulation on the subject appeared in Regulations 86, promulgated February 11, 1935.

It must, therefore, be concluded that the amendments to the Regulations incorporated in the Treasury Decision have been engrafted upon and became a part of all prior Regulations, including Regulations 86 under the

1934 Act and subsequent Regulations, as well as Regulations for all prior years which were silent on the question. In the same paragraph of the Treasury Decision, making the amendments to the Regulations a part of all prior Regulations, appears the exception. It necessarily follows that the exception has been made just as much a part of the Regulations for all prior years as of the current Regulations 103, promulgated under the Internal Revenue Code, and that the exception stated in the last sentence of Par. 2 prevents not only the rules stated in Par. 1 of the Treasury Decision but any rules included in earlier Regulations from affecting the tax liability of a taxpayer with respect to a particular year as to which a proceeding was pending on September 20, 1940 or theretofore decided.

This limitation by the Treasury upon the retroactive effect of the rules for determining earnings and profits, set out in Par. 1 of Treasury Decision 5024, and the corresponding limitation on the application of the rules found in prior regulations, rendering them inapplicable in determining tax liability in pending and decided cases, is merely a recognition in the Treasury Decision of the plain meaning of the exception in Section 501(c). However, without the statutory saving clause, the limitation in Treasury Decision 5024 is a valid exercise by the Commissioner and the Secretary of the discretion expressly given them elsewhere in the Internal Revenue Code.

Section 3791(b) of the Internal Revenue Code reads as follows:

> "(b) *Retroactivity of Regulations or Rulings.*— The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent,

if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect."

The legislative history of this provision commences with Section 1314 of the 1921 Act. That section by its terms permitted the Treasury to apply without retroactive effect a new regulation or a Treasury Decision reversing a prior regulation or Treasury Decision, unless such reversal was occasioned or required by the decision of a court of competent jurisdiction. This section of the 1921 Act was re-enacted without change in Section 1008(a) of the 1924 Act and Section 1108(a) of the 1926 Act.

Section 605 of the 1928 Act amended Section 1108(a) of the 1926 Act by extending the discretion of the Commissioner and the Secretary to cases where the new regulation or Treasury Decision was occasioned or required by a court decision.

Section 506 of the 1934 Act further amended Section 1108(a) of the 1926 Act to read as follows:

"(a) *Retroactivity of Regulations or Rulings.*—The Secretary, or the Commissioner, with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect."

This provision remained unchanged thereafter, and is now Section 3791(b) of the Internal Revenue Code, as set out above.

In explaining the meaning of the 1934 amendment the House Ways and Means Committee (H. Rept. No. 704, 73rd Cong., 2nd Sess., p. 39) said:

> "This section amends Section 1108(a) of the Revenue Act of 1926, as amended, so as to permit the Secretary, or the Commissioner with the approval of the Secretary, to prescribe the extent, if any, to which any regulation, Treasury Decision, or ruling relating to internal-revenue taxes shall be applied without retroactive effect. • • • Regulations, Treasury Decisions, and rulings which are merely interpretive of the statute, will normally have a universal application, but in some cases the application of regulations, Treasury Decisions, and rulings to past transactions which have been closed by taxpayers in reliance upon existing practice, will work such inequitable results that it is believed desirable to lodge in the Treasury Department the power to avoid these results by applying certain regulations, Treasury Decisions, and rulings with prospective effect only."

The question of the Treasury's rule-making power and of the discretion given the Commissioner and the Secretary to limit the retroactive effect of regulations is exhaustively treated in Paul's "Selected Studies in Federal Taxation," Second Series, pp. 76-103. There, in commenting on the legislative history of Section 3791(b) of the Internal Revenue Code, the author says at pp. 81-82:

> "This legislative history leaves little doubt as to the intention of Congress. It seems clearly to have realized at a relatively early date the hardship involved in the Old Blackstonian theory of judicial decisions, especially in a rapidly evolving branch of law like taxation—a branch of law receiving its education only after much delay from so many different, and differing, tribunals. We do not know whether Congress recognized the possibility that the courts might themselves disregard tradition and make their decisions prospective; if it did, Congress seems to have been unwilling to

> put complete trust in this possibility, and to have extended to the Commissioner a broad discretion to grant relief in meritorious cases in which a retroactive application of a court decision would create havoc among innocent taxpayers who relied in good faith upon a current explanation of the statute or constitution."

Further, at page 92, the author says:

> "The equity and fairness of giving the Commissioner power to make regulations non-retroactive would appeal strongly to any court, especially in the not uncommon cases where there may have been a detrimental reliance on former court decisions and regulations almost in the nature of an estoppel."

The author's comments on the intent of Congress and on the equity and fairness of the power given the Commissioner might well have been made in the light of the situation presented in this case.

In the instant case the taxpayer and his corporation were relying upon a rule for the determination of earnings and profits of a corporation well established by court decisions rendered before January 31, 1934, the date of the distribution. The distribution was made by Senior Investment Corporation pursuant to authority contained in a resolution of the Board of Directors which authorized and directed the distribution and referred to it specifically as a capital distribution (R. 11, 19). The taxpayer and his wife did not report the distribution as taxable income in their joint income tax return for 1934, on the ground that it was a capital distribution to be applied against the basis in the taxpayer's hands of the shares on which the distribution was made (R. 11).

It was a matter of common knowledge that "earnings and profits" and "taxable net income" of a corporation were not synonymous terms. That fact was recognized by Treasury Regulations of long standing. Congress in Section 204 of the 1924 Act, the predecessor of Section 113 of the 1934 Act, prescribed an adjusted basis for computing the taxable net income of corporations on the sale or exchange of assets acquired in a transaction in which the gain to the corporation was not recognized under Section 203, the predecessor of Section 112 of the 1934 Act. Congress did not see fit, however, in any Act prior to the Second Revenue Act of 1940 to define the term "earnings and profits" as used in Section 115 of the 1934 Act relating to dividends, and the first Regulation promulgated by the Treasury seeking to define or limit the meaning of that term was contained in Article 115 of Regulations 86, promulgated February 11, 1935, more than one year after the distribution involved in this case.

Contrary to petitioner's assertion (Pet. Brief, p. 23), the taxpayer had a right to rely upon an established judicial interpretation of the term "earnings and profits" found in cases decided before January 31, 1934. Numerous cases theretofore decided had held that the term "earnings and profits" was synonymous with the term "surplus", and that earnings and profits were to be determined in accordance with accepted methods of corporate accounting, recognizing as corporate capital the value of assets when acquired in exchange for stock. *Edwards v. Douglas*, 269 U.S. 204 (Nov. 23, 1925); *Willcuts v. Milton Dairy Company*, 275 U.S. 115 (Nov. 21, 1927); *Helvering v. Canfield*, 291 U.S. 163 (Jan. 15, 1934); *Realty Sales Company*, 10 B.T.A. 1217 (March 18, 1928); *Charles F. Ayer*, 12 B.T.A. 284 (June 1, 1928); *Mead*

Realty Company, 21 B.T.A. 1062 (January 6, 1931); *Reliance Investment Company*, 22 B.T.A. 1287 (April 23, 1931).

In *W. S. Farish & Company v. Commissioner*, 38 B.T.A. 150, aff. 104 F. (2d) 833, which petitioner contends is the first decision on which this taxpayer could have placed reliance, the decision of The Tax Court is based on the proposition that the above cited decisions compelled the conclusion it reached that the earnings and profits of Farish on the sale or exchange of assets acquired for its stock must be computed by reference to corporate cost. Moreover, the question of the effect on earnings and profits of a realized but unrecognized gain was directly involved in the case of *Forhan Realty Corporation* (Memo B.T.A. Op.; unreported; Docket No. 60975; June 16, 1933), reported on appeal when affirmed by the Circuit Court of Appeals for the Second Circuit, Feb. 4, 1935, 75 F. (2d) 268. In that case both the Board and the Court held that the unrecognized gain was to be taken into the earnings and profits account on the basis of corporate cost. The issue in the *Forhan* case was identical with that later decided the same way in *F. J. Young Corporation*, 35 B.T.A. 860, aff. 103 F. (2d) 137. In those cases the question was whether a corporation realizing a corporate gain on an exchange in which such gain was not taxable under Section 112, should include such gain in its earnings and profits account for dividend purposes. In the instant case the question is whether a gain to Fisher on the exchange of assets for stock of his corporation not taxed to him under Section 112 should be included in the earnings and profits account of the corporation, when it sells such assets.

In his brief herein (p. 24) petitioner says that in the face of the opposite rule being applied by the Board

and the courts the Commissioner persisted in applying the Regulation. A review of the decided cases shows that he was applying his Regulation only to cases with factual situations such as in the *Young Corporation* case, and that he did not apply or rely upon his Regulation in cases with factual situations such as in the instant case until after the enactment of the Revenue Act of 1940. The first case involving the factual situation of the instant case in which he relied upon the Regulation was that of *Falkland Corporation v. Commissioner*, Memo T.C. Op.; CCH Dec. 12179-A (November 8, 1941). He did not rely on the Regulation in *W. S. Farish & Company, supra* (July 22, 1938); *A. & J., Inc. v. Commissioner*, 38 B.T.A. 1248 (November 20, 1938), or *Dorothy Whitney Elmhirst*, 41 B.T.A. 348 (February 14, 1940), all with factual situations like that in the instant case. However, in the case of *F. J. Young Corporation, supra*, (April 9, 1937), he did rely upon the Regulation, and the Regulation was rejected as controlling there by both The Tax Court and the Court of Appears for the Third Circuit.

There can be no question but that the taxpayer here had the right to, and did, rely upon an established interpretation which held that corporate earnings and profits were to be determined by reference to corporate cost.

This case presents an unusual factual situation justifying the application of the exception clause for determination of tax liability in such a way as to make it unaffected by the rules found in the 1940 Statute, as well as those in the Regulation promulgated for the first time more than one year after the distribution in question. The taxpayer here filed his return and computed his taxes on the basis that corporate cost was the proper method for computing the earnings and profits of his corporation, in reliance upon what he had reason to believe was a

well settled and established rule. In that respect he is in a different situation from either that taxpayer whose transaction took place after the promulgation of the first Regulation in February, 1935, and whose right to rely on the previously established interpretation might be questioned, or the taxpayer who, in determining his tax liability on his return, had used the method of transferor's cost, and whose liability would not be *affected* by the application of the rule now alleged to have been adopted administratively in February, 1935, and adopted by Congress in October, 1940. If the taxpayer here had filed his return on the assumption that transferor's cost was the proper method of computing the earnings and profits of his corporation, petitioner's position undoubtedly would be that he did not fall within the exception clause, since the application to him of the rules found in Section 501(a) or the prior Regulation would not *affect* his tax liability.

The Commissioner, with the approval of the Secretary, under Section 3791(b) of the Internal Revenue Code had the express right to prescribe the extent, if any, to which any rule or regulation shall be applied without retroactive effect. The language of the Treasury Decision indicates the intention by the Treasury to limit the application of the rules found in Section 501(a) so that they would not affect the tax liability of pending or theretofore decided cases; and, as to those cases, to likewise limit the effect of his prior Regulations on the subject. Such an interpretation is in accord with the view of this Court expressed in *Helvering v. Credit Alliance Corporation*, 316 U.S. 107, wherein this Court said:

> "Section 115(h) was amended in 1938, 26 U.S.C.A., Int. Rev. Acts, page 1058, subsequent to the consummation of the transaction here in

> question, to include money or property, but we cannot, as the Government suggests, read into the section, as it stood when the transaction took place, an intent derived from the policy disclosed by the subsequent amendment."

In petitioner's brief (pp. 10, 11) reliance is placed upon the statement by Mr. Justice Jackson in the *Wheeler* opinion that "indeed Congress appears to have provided for this result in the Statute itself (Section 111(c) of the 1938 Act) which declares: 'In the case of a sale or exchange the extent to which the gain or loss determined under this Section shall be recognized *for the purposes of this title* shall be determined under the provisions of Section 112'." However, that statement of Mr. Justice Jackson, when read in its context, demonstrates that it was not the basis of this Court's decision. Its decision rested solely on the proposition that the Regulation was valid and governed the *Wheeler* case on its facts. We believe that the statement respecting Section 111(c) in the Court's opinion was no more than a conjecture as to the intent of Congress.

As a matter of fact, that phrase and similar expressions such as "under this title" and "as used in this title" are contained at least twenty times in the Revenue Act of 1934. Its unimportance as a substantive provision is highlighted by the fact that the Committee Reports with respect to §202(d) of the Revenue Act of 1924 (the predecessor of §111(c)) omit the phrase altogether in paraphrasing the section. For instance, the Senate Finance Committee Report (Senate Report 398, 68th Cong., 1st Sess., p. 13) states:

> "(4) Subdivision (d) 111(c) is merely informatory, stating that the amount of the gain deter-

> mined under its provisions shall be recognized as provided in Section 203 (112), which states those cases in which no gain or loss from a sale or exchange is recognized and those cases in which a limitation is placed upon the gain or loss to be recognized from the sale or exchange."

The meaning of the phrase "for the purposes of this title" and similar expressions becomes apparent when we look upon the pattern used in Revenue Acts. Thus, the 1934 Act consisted of six Titles. Of those, Title I relates to income taxes, Title IV, to excise taxes, Title V, to capital stock and excess profits taxes, etc. The broadest meaning that can be attributed to the clause as used in Section 111(c) is that the gain or loss is to be determined under the provisions of Section 112 for the purpose of determining the *income tax* liability of the taxpayer realizing such gain or loss. In other words, Congress was merely providing that the provisions of that subsection applied for the purpose of computing the *income tax* liability of the taxpayer involved at rates prescribed elsewhere in that Title.

During the history of this case petitioner has urged three inconsistent positions with respect to the meaning of the exception found in Section 501(c). In his brief in the Circuit Court (pp. 25-26) he said that the only reasonable explanation of the exception in that subsection "is that the exception was enacted because Congress, quite rightfully, did not believe that it would be proper for it to dictate to the Judiciary the manner in which the courts should decide controversies over which jurisdiction had already been taken or to interfere with decisions already reached. * * * Because Congress refused to interfere with the jurisdiction of the courts to decide pending

cases which, of course, includes their jurisdiction to err, it does not mean that Congress intended to direct or urge the courts to make a wrong decision." On brief in the court below the taxpayer pointed out that this theory is not in accord with Congressional policy as indicated by numerous amendments to the Revenue laws which directly affected cases then in litigation, and even went so far as to nullify decisions theretofore rendered by this Court and authorize refunds of taxes already collected. A notable example showing absence of that deference to the Judicial branch is found in Section 134 of the Revenue Act of 1943, amending Section 167 of the Internal Revenue Code and nullifying the decision of this Court rendered shortly prior thereto in *Commissioner v. Stuart*, 317 U.S. 154. In fact, the amendment makes refundable taxes theretofore collected on the basis of the rule adopted in that decision. The taxpayer further pointed out that this interpretation of the meaning of the limitation clause in effect amounted to Congressional sanction to decisions of The Tax Court or other lower United States courts in determining tax liability in all such cases pending on September 20, 1940 or theretofore decided. Moreover, the taxpayer urged that this amounted to the adoption by Congress of a rule respecting the finality of decisions of The Tax Court and other lower courts, within the particular limits set out in the exception clause, comparable to the rule announced by this Court in *Dobson v. Commissioner*, 320 U.S. 489.

In his petition for certiorari petitioner abandoned the interpretation he had urged in the Circuit Court and there interpreted the legislation and his Regulations thereunder as merely providing that "if there should be an erroneous final decision in favor of a particular taxpayer in a case pending on September 6 (20), 1940, or

already decided, the finality of the decision would be limited to the particular year involved and *res judicata* would not operate to give him (or other stockholders in the same corporation) a vested right in the wrong method of computing earnings and profits for all other taxable years" (Petition, p. 12).

The unreasonableness of this interpretation was pointed out in the taxpayer's brief in opposition to the petition for a writ. Under that interpretation of the exception Congress intended it merely as a protection for the Government, designed to prevent corporate taxpayers or their shareholders, whose liabilities had been determined by a computation of corporate earnings and profits on a method other than that prescribed in Subsection 501(a), from invoking the doctrine of *res judicata* in cases later arising. The language of the exception itself shows clearly that it was not intended as protection for the Government but as protection for taxpayers within two limited classes, namely, those whose liabilities (1) had theretofore been determined, or (2) were in litigation and pending on September 20, 1940. The Conference Report on the Bill expressly refers to the second sentence of Section 501(c) as an exception, saying:

> "The House recedes with an amendment providing that the *exception* added by the Senate amendment relative to pending or decided cases shall apply * * *."[4] (Italics supplied.)

Other considerations demonstrate the error of attributing to Congress such an intent in the enactment of the exception. If that had been its intent the exception would not have been limited to cases pending on September 20,

[4] H. Conf. Rept. No. 3002, 76th Cong., 3rd Sess., p. 2.

1940 or theretofore decided, since there was as much likelihood of "an erroneous final decision" in cases arising after September 20, 1940, or thereafter decided, as in cases pending on September 20, 1940, or theretofore decided. Moreover, assuming that intent, it could and would have been stated in more clear, simple, and positive language, namely that "no decision in any case decided by the application of a rule for determining earnings and profits of a corporation contrary to those set out in subsection (a) of this section shall be *res judicata.*"

Petitioner in his brief herein has again changed his position with respect to the meaning of the exception. He now admits for the first time (Pet. Br. p. 25) that "Congress believed that it was restating existing law, but recognized that this view might be judicially rejected." He now interprets Congressional intent as evidencing a willingness to enact the rule into all prior Revenue Acts, to be applicable to all future cases where earnings and profits of prior years might be involved, but as evidencing a belief that it was not desirable to extend the express enactment to cases which were already in litigation. He says, with respect to the reference in the exception clause to cases *theretofore decided*, that although Section 501 *probably* would not have affected such cases, Congress, out of legislative caution, provided that the tax liability involved in those cases should not be affected by the enactment of Section 501, and with respect to cases in litigation, but in which final judgments had not been entered, that the courts were to be left free to decide the case according to existing law, without resorting to Section 501 to affect the tax liability involved.

It seems strange that petitioner, who by law is charged with the interpretation and administration of the Statute,

has finally, after the lapse of approximately four and one-half years, evolved an interpretation of Congressional intent entirely inconsistent with other views of Congressional intent which he has previously urged upon the courts.

In reply to respondent's statement in the brief in opposition to the petition for a writ that on the theory of legislative intent urged in the petition Congress would be guilty of absurd legislative practice, petitioner says in his brief (p. 24) that respondent's argument overlooks the fact that enlightened hindsight is scarcely a test of the wisdom of prudent forethought. However, it is on the basis of petitioner's present enlightened hindsight in view of the *Wheeler* decision that he now evolves his theory of Congressional "prudent forethought." Since it was established by the *Wheeler* case that there is no necessity to view Section 501 as retroactive legislation, he now seeks to impute to Congress an intent to give meaning to the exception only if Section 501 were to be construed as new legislation retroactively applied.

His latest theory of Congressional intent which he now urges on this Court is just as unconvincing as the previous theories which he has advanced. If a final judgment had been entered in a case before the enactment of Section 501 such final judgment could in no way be affected by the legislation, a circumstance of which the Congress must have been fully aware. To say, as petitioner says, that the reference in the exception clause was included "out of legislative caution" is attributing to Congress an intention to include in the legislation futile and unnecessary provisions. Likewise, it seems apparent that in stating the exception as applied to cases pending, Congress did not merely intend that the courts "were left

free to decide the case according to existing law, without resorting to Section 501(a) to affect the tax liability involved." So interpreting the reference to pending cases, Congress was not conferring on the courts any jurisdiction which they did not already have. The courts, without the exception clause, were at perfect liberty to decide cases on the basis of existing law without resorting to Section 501. For example, a court then having jurisdiction or later acquiring jurisdiction over a case involving the year 1934, could hold that the pre-existing law was contrary to the rules stated in Section 501 and for that reason Section 501 could not be viewed as clarifying legislation. Again, considering the Section as new legislation applied retroactively, The Tax Court or any Federal court could hold the retroactive application valid or invalid, and in every respect could exercise the same judicial function, with the same freedom of action, as though the exception clause had not been included in Section 501(c).

Indeed, the petitioner's present argument with respect to the meaning of the limitation clause defeats his own case. If the reference to cases *theretofore determined* in the clause "which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States" refers to cases in which final judgments had already been entered, then there can be no question but that Congress intended that in the determination of tax liability in cases pending on September 20, 1940, earnings and profits were to be computed by reference to corporate cost. At the time of enactment of Section 501 Congress was aware of the fact that in all cases involving the question theretofore decided by the Board of Tax Appeals and the Federal courts tax liabilities had been determined by

use of corporate cost in determining earnings and profits on the sale of assets acquired for stock.[5] Since in all cases theretofore decided earnings and profits had been computed by reference to corporate cost as a basis, it necessarily follows under petitioner's theory that Congress intended the same basis should be used in determining tax liability in pending cases and those decided (but not finally), since all three classes of cases are referred to in the sentence stating the exception.

3. In Enacting the Exception Congress Intended that the Use of Corporate Cost in Computing Earnings and Profits Was at Least Permissive in the Determination of Pending and Theretofore Decided Cases, Thereby Applying Legislatively a Rule Similar to that Applied by this Court in *Dobson v. Commissioner.*

In the instant case, unlike the *Wheeler* case, The Tax Court decided in favor of the taxpayer, and held that in determining Fisher's tax liability earnings and profits were to be computed by reference to corporate cost. In so doing it considered the application of the exception clause in Section 501(c), as well as the long line of cases theretofore decided by it and the Federal courts. It further concluded that by reason of the exception clause the rule in Article 115-1 of Regulations 86 was not to be applied. The Tax Court in reaching its conclusion was viewing Section 501 both as retroactive legislation and as clarifying legislation. In the earlier case of *Falkland Corporation, supra*, with facts on all fours with the instant case, The Tax Court held that, viewed as clarifying legislation, the limitation in Section 501(c) of the Second Revenue Act of 1940 would make it clear error to apply the rule requiring the use of transferor's cost to a case

[5] H. Rept. No. 2894, 76th Cong., 3rd Sess., p. 41.

pending on September 20, 1940. In this connection The Tax Court said:

> "But even if we assume that there was some intent to clarify the pre-existing law, we think it clear that no effect can be had upon the instant proceeding, for Section 501(c), although specifically providing that subsection (a) (in effect providing for the use of adjusted basis in determining earnings and profits under Section 115) shall be effective as a part of prior revenue acts, goes on to provide specifically that nothing in such subsection 'shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States.' This is such case, and it would be clear error, we think, in the light of such statute, to hold that the statute of 1940 affects the tax situation of the present taxpayer."

Congress and this Court have long been aware of the specialized knowledge possessed by members of The Tax Court. As pointed out by this Court in its recent decision in *Kelley v. Commissioner*, and *Talbot Mills v. Commissioner*, ... U.S. ....., decided January 7, 1946, Congress as early as 1926 recognized this fact and enlarged the finality of the Board of Tax Appeals decisions from "prima facie evidence of the facts therein" to reviewability only "if the decision of the Board is not in accordance with law." In commenting there on Congressional recognition of the Board's special qualifications, this Court in footnote 7 to its opinion quoted the following from the report of the Ways and Means Committee in connection with the Revenue Act of 1926:*

> "Inasmuch as the complicated and technical facts governing tax liability require a determination by

*H. Rept. No. 1, 69th Cong., 1st Sess., pp. 19-20.

> a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the packers and stockyards act. In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, subdivision (b) of Section 914 limits the review on appeal to what are commonly known as questions of law. The Court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence (see subdivision (a) of Section 907 and subdivision (b) of Section 914) (§1003(b) of the Act as passed). The Court, therefore, may adequately control the action of the administrative officer or agency, but will not be burdened with the duty of substituting its opinion for that of the Board upon the evidence."

In applying the rule of *Dobson v. Commissioner, supra,* and giving finality to decisions of The Tax Court on the question of whether certain corporate securities were corporate bonds or preferred stock, this Court in the *Kelley* case said:

> "The illustrations in the report, note 7, *supra,* are legal questions without doubt, except the possibility that the words 'application of the statute or any regulation having the force of law' may be thought to give a reviewing court power to pass upon the Tax Court's conclusion from the primary or evidential facts. So that in the present cases, it

> might be said to be a question of law as to whether the primary facts adduced made the payments under consideration dividends or interest. But we think such conclusion gives inadequate weight to the purpose of The Tax Court. The finality of The Tax Court's rulings was being enlarged by the 1926 Act. The then Board was spoken of as an impartial and independent tribunal of experts 'for the determination of tax liabilities as between the government and the taxpayer.' H. Rep. No. 1, 69th Cong., 1st Sess., p. 17. There would hardly need to be experts in tax affairs to decide questions of dates or amounts or values or to calculate rates. Their usefulness lies primarily in their ability to examine relevant facts of business to determine whether or not they come under statutory language. Adequate reason for the use of the word 'application' of course exists in situations where true legal questions arise, as in whether an act applies to transfers antecedent to its enactment or to income or estate taxes from trusts or to situations which involve conflicts of law. There is nothing in the context in which the word 'application' is used which suggests to us that it should be given its widest connotation."

There this Court said that the conclusion of The Tax Court with respect to whether certain corporate obligations were for tax purposes bonds or preferred stock, based upon its *application* of the Statute to the facts of each case, was not subject to review. Here there is involved the *application* of the exception in Section 501(c) to the facts in the instant case. The Tax Court's decision is entitled to the same finality in the instant case as in the *Kelley* and *Talbot Mills* cases. In the instant case The Tax Court applied the exception to the facts in the case. Based on that *application* it concluded that the tax liability would be affected by applying the rules of

Section 501(a) or Article 115-1, Regulations 86, and that the exception expressly required that tax liability should not be so affected.

Congress was also aware of the fact that the term "earnings and profits," in the absence of statutory definition, involves a pure accounting concept and, therefore, a question of fact, and that the Board and the courts had been holding that the term was not defined in any prior Revenue Act. It had been so held in a number of cases. In *R. M. Weyerhauser*, 33 B.T.A. 594 (November 29, 1935), the Board said:

> "• • • It is apparent, therefore, that 'taxable net income' is purely a statutory concept.
>
> "Earnings and profits, on the other hand, are not defined by the Act; *but they have a settled and well defined meaning in accounting* • • •." (Italics supplied.)

With this knowledge and in recognition of the fact that the Board of Tax Appeals, with its specialized knowledge in the field of tax law, had consistently been requiring the use of corporate cost in computing earnings and profits, and that the appellate courts without exception had accepted the Board's informed judgment, Congress by the limitation clause was at least giving Congressional sanction to decisions in cases theretofore decided (but as to which the time for appeal had not expired)[7] and in

[7]It is significant in this regard to note that the Treasury Department did not appeal from the decision of the Board entered May 17, 1940, in the case of Dorothy Whitney Elmhurst, 41 B.T.A. 348. The Board there upheld the use of corporate cost as the proper basis for computing earnings and profits of her corporation. One year involved was 1934, as in the instant case. Time for appeal expired during the pendency before Congress of the Second Revenue Act of 1940. Although the taxpayer appealed on other issues the Treasury did not appeal, indicating that it then construed the saving clause, respecting cases theretofore decided, as making the Board's decision final and conclusive on the question. In settling the taxpayer's appeal on a stipulation filed July 31, 1941, the Treasury accepted and gave effect to the Board's decision that corporate cost was the proper basis.

cases pending on September 20, 1940. Even if not prescribing that method, it was at least providing that the use of such method was permissive, and cases so decided were entitled to finality.

The decision of The Tax Court in the instant case, based upon its application of the exception clause, did not establish a rule of general application to a large class of taxpayers. The rule there established applies only to the very limited class of taxpayers with cases pending on September 20, 1940, or theretofore decided (but not finally), and which involved the particular issue present here. The fact that the rule is one of limited application is seemingly shown by the fact that, aside from the instant case, only three of such cases have been considered and passed upon by The Tax Court. *Dorothy Whitney Elmhirst, supra; Falkland Corporation, supra; Senior Investment Corporation*, 2 T.C. 124.

In this respect The Tax Court's decision herein should be viewed in the same light as its decision in the *Kelley* and *Talbot Mills* cases. The Tax Court's decision herein satisfies the test laid down by this Court in its decision in *Dobson v. Commissioner, supra*, wherein it said:

> "But 'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body'."

The exercise by the Board of final jurisdiction in cases subject to its review was not then unprecedented, and such final jurisdiction has since been given The Tax Court in other matters. It exercised final jurisdiction in its review of determinations by the Commissioner under Sections 327 and 328 of the Revenue Act of 1918, being the excess profits tax relief sections. Congress by Sec-

tion 900(e) of the Revenue Act of 1924 had conferred on the Board jurisdiction to review determinations by the Commissioner, and this Court in *Blair v. Oesterlein Machine Company*, 275 U.S. 220, held that such jurisdiction extended to determinations under Sections 327 and 328. In *Williamsport Wire Rope Company v. Commissioner*, 277 U.S. 551, this Court held that such determinations were not reviewable by the courts, saying:

> "Thus the aims which induced Congress to enact §§327 and 328, the nature of the task which it confided to the Commissioner, the methods of procedure prescribed, and the language employed to express the conditions under which the special assessment is required, all negative the right to a review of his determination by a court."

The Tax Court was granted final jurisdiction under Section 403(e) (1) of the Renegotiation Act of 1942, as amended, c. 247, 56 Stat. 245, in cases involving the determination of excessive profits on war contracts or subcontracts.

It seems clear, as argued hereinbefore, that by reason of the exception clause the courts were expressly prohibited from affecting respondents' tax liability by application of the rules found either in Section 501(a) or in the prior Regulations. The decision below can be affirmed, however, on a narrower interpretation of the exception, namely, that Congress intended by the exception to give finality to decisions in cases theretofore decided (but not finally); and as to cases pending on September 20, 1940, to make decisions therein, applying the rule for determining earnings and profits theretofore consistently applied by all courts, permissive and final. In the words of the Senate Finance Committee Report: "These cases

now actually in litigation are left to be determined as the Board or the Court may see fit.'"[8]

CONCLUSION

The petitioner criticizes the reasoning used in the opinion of the Court of Appeals. We do not believe such criticism to be justified. However, the decision of that Court affirming the Tax Court correctly disposed of the case. In a review of Judicial proceedings the rule is well settled that if the decision below is correct it must be affirmed, even though the lower court relied upon a wrong ground or gave a wrong reason. *Helvering v. Gowran*, 302 U.S. 238; 9 Mertens, Par. 51.31.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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[8] S. Rept. No. 2114, 76th Cong., 3rd Sess., p. 26.

SUPREME COURT OF THE UNITED STATES.

No. 452.—October Term, 1945.

Commissioner of Internal Revenue, Petitioner, vs. Charles T. Fisher, Edward F. Fisher, and Leo M. Butzel, Executors of the Estate of Fred J. Fisher, and Bertha M. Fisher.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 11, 1946.]

Mr. Justice Black delivered the opinion of the Court.

In 1934 the Senior Investment Corporation, organized in 1929 by one Fisher and his wife for family investment purposes, distributed to Fisher 43,300 shares of General Motors stock valued at $1,723,881.25. Fisher and his wife made a joint tax return but did not report this amount as income. The taxpayers contended that since the Senior Investment Corporation showed a book deficit for 1934, the distribution in question was a "capital distribution" and not a corporate dividend from "earnings and profits," which latter was the type of distribution taxable under Section 115(a) of the then controlling tax law. 48 Stat. 680, 711. The Commissioner decided that the following circumstances justified a finding that the distribution was taxable as a dividend from "earnings or profits": When the Senior Investment Corporation was organized Fisher and his wife paid for their shares of stock with securities which had cost them $14,500,000, but had by the date of organization acquired a market value of $88,000,000. To show that the corporation had a deficit and that consequently the distribution of General Motors stock was not from "earnings or profits," the taxpayers used the corporation's computation based on the $88,000,000 rather than the $14,500,000 figure. The Commissioner decided that the $14,500,000 cost to Fisher and his wife of the securities they transferred to the corporation in exchange for shares of its stock was the proper base for ascertaining whether the corporation could make a distribution from profits; that the use of that figure would show a surplus in 1934; and that the distribution of the General Motors stock was therefore a taxable dividend from "earnings or profits." On review the Tax Court following its prior holdings rejected the Commissioner's argu-

ment and decided for the respondents. The Circuit Court of Appeals affirmed. 150 F. 2d 198.

Since Section 112 of the Revenue Act of 1934 did not tax the gain resulting from transfers of property to a corporation in exchange for stock in that corporation, it is obvious that rejection of the Commissioner's contention would result in permitting the Section 112 exemption to be used as a device for evading taxes Congress intended to impose on many gains actually realized from sales of property. But we upheld the views urged by the Commissioner here, in *Commissioner v. Wheeler*, 324 U. S. 542, decided on the same day that the Circuit Court of Appeals handed down its decision in this case. In that case we held that in the second Revenue Act of 1940, 54 Stat. 974, 1004-1005, Congress clarified its original purpose in enacting the 1934 Act and others to require that corporate earnings be computed on a basis of cost of the property to transferors like Fisher. That decision would have controlled the disposition of this case were it not for the fact that on rehearing the Circuit Court of Appeals held that a proviso in the second Revenue Act of 1940 excepted taxpayers like Fisher from liability under the Revenue Act of 1934. That proviso stated that the 1940 Act should not "affect the tax liability of any taxpayer for any year which on September 20, 1940, was pending before, or was theretofore determined by the Board of Tax Appeals, or any Court of the United States." This case was pending before the Tax Court on September 20, 1940, and respondents here contend that the proviso was intended to exempt Fisher from the tax liability to which he would otherwise be subject.

In other words respondents assert that Congress intended by the proviso to pick out a small group of taxpayers and award them special tax exemptions which the whole Act was designed to deny all other taxpayers who did not happen to have tax litigation pending in September 1940. The proviso indicates no such purpose. The proviso means what it says, that the enactment of the 1940 Act was not to affect the tax liability of those who had cases before the Boards or Courts, whatever that tax liability under the earlier revenue laws. Under those earlier laws as interpreted by us in the *Wheeler* case, the distribution of General Motors stock to Fisher imposed on him a tax liability which remained unaffected by the enactment of the 1940 statute.

Reversed.

Mr. Justice DOUGLAS, Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or decision of this case.